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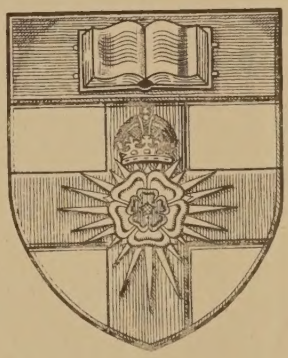

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REPORTED BY

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AND

In the Bail Court,

BY

ARTHUR WILSON,
BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. X.

FROM MICHAELMAS TERM, 1874, TO TRINITY TERM, 1875,
BOTH INCLUSIVE.
XXXVIII VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
1875.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXVIII VICTORIA.

KENT *v.* THE MIDLAND RAILWAY COMPANY.

1874
Nov. 2.

Railway Company—Liability for Loss of Luggage "arising off their Lines"—Construction of Condition—Evidence.

Plaintiff took a ticket of the M. Ry. Co. from A. to C. On the ticket was stated that it was issued subject to the conditions in the company's time-tables, one of those conditions being: "The company does not hold itself responsible for any delay, detention, or other loss or injury arising off its lines."

The journey from A. to C. is on the M. line to B., and thence by the L. & N. W. line. At B. the station belongs to the L. & N. W. Co., and all the clerks and porters are hired and paid by that company; but by agreement, sanctioned by Act of Parliament, the M. company have the use of the station and the services of the clerks and porters on payment of an annual sum.

Plaintiff delivered his luggage to the M. Co. at A.; and when the train by which he travelled arrived at B., a porter took plaintiff's luggage from the train and put it on a truck and, after about twenty minutes, wheeled the truck across to the platform from which the L. & N. W. train was about to start for C. The plaintiff saw the luggage on the platform, and this was the last that was seen of it. On the above facts, the Court having power to draw inferences of fact:—

Held, that, assuming the plaintiff to be bound by the condition, the meaning of "off the company's lines," when applied to luggage, must be taken to be, not "off the lines of railway" merely, but "out of the custody of the company." The plaintiff's luggage was shewn to have been delivered to the defendants, and it lay on them to shew that they had delivered it to the L. & N. W. Co, which they had not shewn; and the plaintiff was therefore entitled to recover against the defendants for the loss.

DECLARATION that plaintiff became passenger to be safely

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carried, with his luggage, by defendants, from Bath to Chester, and that the luggage was lost.

Pleas (inter alia): 1. That defendants did not receive plaintiff and his luggage to be carried as alleged. 2. Denial of the breach. 3. That defendants received plaintiff and luggage on a certain condition; setting it out.

Issue joined.

At the trial before Archibald, J., at the summer assizes at Liverpool, the following facts, from the statement of counsel, were taken as proved:—The plaintiff bought a ticket, at the defendants' station at Bath, from Bath to Chester. On the back of the ticket (which, however, the plaintiff took no notice of) was printed: "This ticket is issued subject to the regulations and conditions stated in the Midland Company's time-tables and bills." On the time-tables and bills was printed the following: "The granting of tickets to passengers to places off the company's lines is an arrangement made for the greater convenience of the public; but the company does not hold itself responsible for any delay, detention, or other loss or injury whatsoever arising off its lines."

The journey from Bath to Chester is performed on the defendants' line to Birmingham, and is thence continued on the London and North Western line. At Birmingham the station belongs entirely to the London and North Western Company, but the trains of the Midland line come up to the platforms on one side of the station, the North Western trains using the platforms on the other side. The following arrangement, made between the Midland Company and the London and North Western Company, is entered in schedule B. of the London and North Western Railway Company's Act, 1868 (31 & 32) Vict. c. cxviii.:—

"The Midland Company to have the use henceforth, for their passenger traffic, of the new central station of the London and North Western Company in Birmingham, and of the line and approaches thereto, with the use of rooms for clerks' offices, on payment of the yearly sum of 100*l.*, paying also, as at present [i.e. one annual sum], for the use of porters and clerks, and such other services as they may require for their traffic; and the London and North Western Company continuing to find and supply the same."

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The plaintiff's luggage, consisting of a portmanteau and carpet-bag, was put into the train at Bath. On the arrival of the train at Birmingham a porter took the luggage from the Midland train, and after twenty minutes the porter came on to the other platform from which the North Western train was about to start for Chester, with the luggage on a truck, and that was the last that the plaintiff saw of it (1); and on the arrival of the train at Stafford it could not be found.

On this statement of facts, a verdict was taken for the plaintiff for the agreed sum of 84*l.*, leave being reserved to move to enter the verdict for the defendants, the Court to draw inferences of fact.

Herschell, Q.C. (*J. Edge* with him), moved accordingly. The defendants are entitled to the verdict by reason of the condition. First: The condition was good and was available to protect the defendants from loss on a railway not belonging to the defendants: *Zunz* v. *South Eastern Ry. Co.* (2) Secondly: The condition bound the plaintiff although he was not aware of it: *Stewart* v. *London and North Western Ry. Co.* (3) Lastly, the evidence shewed that the luggage was safe until it was off the defendants' line. Conceding that while on the platform to which the defendants' line comes up, it was still in the defendants' custody, and therefore not off their line, still, when it was shewn to have been taken across to the platform whence the North Western train was about to start, it was then off the defendants' line. The evidence is, at least, as consistent with the supposition that it was lost or stolen on one railway as on the other; and if so, the plaintiff ought to have been nonsuited: *Midland Ry. Co.* v. *Bromley.* (4) The facts of that case were precisely similar to the present; and the Court held, that it lay on the plaintiff to give some preponderating evidence of the non-performance of the defendants' contract.

COCKBURN, C.J. I think there ought to be no rule. The facts are shortly: That the plaintiff took a ticket of the defendants

(1) There was also the statement, that the porter told the plaintiff, when seated in the N. W. train, that he had put the luggage into a through van; but, on the motion, the Court rejected this statement as inadmissible in evidence to prove the fact that the luggage had been put into the N. W. train.

(2) Law Rep. 4 Q. B. 539.

(3) 3 H. & C. 135; 33 L. J. (Ex.) 199. 10 Jur N.S. 803

(4) L. C. B. 372; 25 L. J. (C.P.) 94 2 Jur N.S. 140

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from Bath to Chester. The defendants' own railway extends as far as Birmingham, and from Birmingham the journey is continued on the London and North Western railway. The plaintiff was safely conveyed with his luggage to Birmingham. At Birmingham, the whole station belongs to the North Western Company; but by the terms of an agreement the Midland Company are entitled to the use of the station and platforms and the services of the porters. The luggage was removed by one of the porters from the Midland train across the station, in the direction of the platform from which the North Western train was to start; but it was not seen by the plaintiff or any one else actually in a carriage of the North Western train. There was nothing to shew that the luggage was ever delivered into the custody of the London and North Western Company. Therefore, but for the stipulation on which they rely, the defendants would be liable for the loss. By the condition referred to on the ticket, the defendants were not to be liable for any loss arising off their own lines: that must receive a reasonable construction, and in order to bring themselves within it they must shew that the luggage when lost was out of their custody. It was the defendants' duty to carry it from one platform to the other, for it must be taken that by their contract they were bound to take the luggage from their own train to that of the North Western train; and they were entitled to the services of the porters at the station. Consequently the porter, while he was taking the luggage from one platform to the other, was acting as the defendants' agent or servant. The defendants, therefore, have failed to shew that it was ever out of their custody, and to establish that in point of fact the loss occurred off their line.

BLACKBURN, J. I am of the same opinion. The defendants granted a ticket from Bath to Chester; and if there were nothing more, they would have been bound to carry the plaintiff and his luggage safely to Chester, or cause them to be carried on other lines, as substitutes for themselves. That, it is established by a series of cases, is the nature of the contract. Therefore, but for the condition, the plaintiff would be entitled to succeed. Now, I assume in the defendants' favour that the plaintiff, although he did not know of the condition, was bound by it. I must be distinctly understood

to express no opinion on the point. The condition is that the company "do not hold themselves responsible for loss off their lines." That, again, I assume in favour of the defendants, means that the plaintiff is carried on the condition that the defendants are not to be held responsible by him for loss occurring off their lines. Did the loss happen "off the defendants' line?" The burthen of proof is on the defendants to shew this. And I think, on the facts, the luggage being last seen on the platform and never seen afterwards, the jury would have found that the luggage was stolen from the platform. Now, the whole station belongs to the London and North Western Company, and on one side the Midland trains come up to the platform, and on the other the North Western trains; and, by agreement, the Midland Company have the right to use the whole station and also to the services of the porters, on payment to the North Western Company of a certain annual sum. The luggage in one sense was off the Midland line, not being actually on the line which is the property of the Midland Company. But I think "off the line" must be understood as equivalent to out of their custody, and in the custody of some other company. If the plaintiff had sued the London and North Western Company (assuming that company could have been liable to the plaintiff), they would have said: We did not take the plaintiff's luggage; it never was in our custody, but was still in the control of the Midland Company and under their orders when last seen, and it was never shewn to have been delivered to us. I cannot put such a construction as to make nobody liable at all; and I think, that unless it be shewn to be on the line of another company it must be held not to be "off the line" of the defendants.

QUAIN, J. I am of the same opinion. The question is, whether the luggage was lost "off the line" of the defendants or not. That must mean, not merely off the line of rails, but off their station or any premises which may be called part of the line. Now, was it off the station of the defendants merely because the property in the station belongs to the North Western Company? The defendants have the use of the station by agreement with the North Western Company; and the station virtually is the station partly of the Midland Company and partly of the North Western

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Company; and until the luggage was out of the custody of the defendants, it is on their line. It was shewn to have been delivered to the defendants, and must be taken to remain with them until delivered to the North Western Company. It was last seen on the station, and the defendants did not prove it was delivered to the North Western Company. I give no opinion as to the validity of the condition or as to whether the plaintiff was bound by it. My judgment proceeds simply on the ground that the luggage was last seen on the line, and not off the line, of the defendants.

ARCHIBALD, J. I am of the same opinion. I expressed and had no opinion at the trial; but I am now of opinion that the facts do not bring the defendants within the condition. Apart from the condition the defendants would have been bound to carry the luggage safely to Chester. Was the luggage "off the line" of the defendants? On the facts of the case as they stood, the case does not differ from what would have been the case if the servants at the station were directly hired and paid as the servants of the Midland Company. They were employed by that company, and the porter was acting as the servant of the Midland Company, when he had the luggage in the truck on the platform; and it was last seen in his custody. I think, therefore, the facts did not bring this case within the condition, on the ground that the luggage must be considered to be on the line of the Midland Company, so long as the servants of that company had charge of it.

Rule refused.

Attorneys for defendants: *Beale, Marigold, & Beale.*

KITTOW AND OTHERS, APPELLANTS; THE GUARDIANS OF LISKEARD UNION AND OTHERS, RESPONDENTS. 1874 Nov. 11.

Poor-rate—Rateability of Surface Land occupied by Buildings connected with Mines—Title under which the Occupier holds immaterial.

18 & D. 316
9608 D59 2
595.

The owners granted for twenty-one years, to certain grantees, full liberty, licence, and power to dig shafts, &c., and work and raise, and make saleable and sell, the minerals under certain limits, and to erect within the limits such sheds and other buildings as should be necessary for the above purposes. A cost-book mine company was established under the above grant, and certain buildings, machinery, tramways, &c., were erected on part of the surface within the limits:—

Held, that it was immaterial what title, if any, was conferred by the above grant; the partners in the company were, by their servants and agents, the sole occupiers of that part of the surface on which the buildings, &c., were erected, and were rateable to the poor-rate in respect of such occupation.

Guest v. *East Dean* (Law Rep. 7 Q. B. 334) explained.

CASE stated, under 12 & 13 Vict. c. 45, on an appeal against a poor-rate for the parish of St. Cleer, in the county of Cornwall, made on the 7th of October, 1872, upon the appellants as occupiers of surface land of South Caradon Mine, with the houses, buildings, machinery, tramways and plant.

The assessment in question was as follows:—

Name of Occupier.	Name of Owner.	Description of property rated.	Name or situation of property.	Estimated extent.	Gross estimated rental.	Rateable value.	Rate at 8d. in the pound.
				a. r. p.	£ *s. d.*	£ *s. d.*	£ *s. d.*
Childs, Christopher Kittow, Richard Kittow, Thomas Lawrence, John Hodge . . . Raby, John . .	Norris, Mrs. Mary Ann	Surface land of South Caradon Mine, with the houses, buildings, machinery, tramways, and plant.	Caradon	8 0 0	1432 0 0	1157 0 0	38 11 4

1. By an indenture dated the 6th of May, 1862, between the Rev. George Poole Norris and Mary Ann his wife, the owners in fee of the lands in question, of the one part, and Richard Kittow and Thomas Kittow, two of the appellants, and one Peter Clymo, since deceased, their respective executors, administrators and assigns, called the grantees, of the other part, the grantors ap-

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pointed gave and granted unto and to the use of the grantees full and free liberty, licence, power, and authority to dig, work and search for all metals, ores, and metallic minerals in and throughout a certain piece of uninclosed land, part of Caradon (denoting it by boundaries), thereinafter called the "limits," . . . and the metals, ores, and metallic minerals there found, to raise and bring to grass, and there to stamp, spall, pick, dress, cleanse, and make merchantable and fit for sale (subject to certain reservations, dues, &c.), to take, carry away, convert, and dispose of the same to their own use, and at their will and pleasure, and within the same limits to dig, work, sink, and make and drive such adits, shafts, pits, drifts, leats, and watercourses, and to erect such sheds, engines, and other buildings (other than dwelling houses and burning, calcining, and smelting houses) as the grantees should think necessary and convenient for the more effectual exercise of the liberties, powers and authorities thereby granted; reserving free liberty to the grantors and their servants, &c., to enter on the limits during the term and drive pits and adits, with the necessary shafts, into any other lands, and to erect and support any building and machinery within the limits for the driving of such adits, &c., and also full power to the grantors and their servants to enter at all times during the continuance of the liberties, licences, powers, and authorities thereby granted, to go down into the adits, shafts, workings, &c. within the limits. To have, hold, and use, exercise and enjoy the several liberties, licences, powers and authorities thereby granted unto and to the use of the grantees from the 15th of June, 1867, for the full term of twenty-one years. There was a covenant (inter alia) by the grantees to pay all rates and taxes, parliamentary and parochial, which should be charged at any time during the term on the same mines, &c., or in respect of any houses, buildings or machinery incident to any such mine; and also a covenant to carry on the mine on the cost-book principle.

2. The operations under the above sett or licence have been and still are carried on by a company constituted in accordance with one of the covenants in the sett, on what is known within the stannaries of Devon and Cornwall as "the cost-book system," and such a company is called a "cost-book company." A cost-book company

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is usually formed in the following manner:—A grant or licence having been obtained to one or more persons from the owner, either by way of sett or licence to search for minerals, or the right to mine and get them (which grant or licence is considered to be held in trust for the company when formed), a meeting is held of the persons intending to become shareholders in the proposed adventure, the number of shares into which it is to be divided is determined, and, with the names and addresses of the shareholders and the number of shares allotted to or taken by them respectively, is entered in a book called "the cost-book" of the mine. It is also usual to appoint an officer called the purser, by whom the accounts of the adventure are kept and entered in the cost-book, by whom also meetings of the adventurers are convened, and who acts generally for the adventurers in the intervals between the general meetings. In certain defined equity proceedings in the Stannaries Court the purser can sue and be sued on behalf of the adventurers, and by the Stannaries Act, 1869, can sue in other courts for calls made on the shares; but in other respects there is not any officer or agent of a cost-book company who is authorized by virtue of his office to represent the company, or to sue and be sued, or accept service of process on behalf of the company, which, not being registered or incorporated under any of the statutes relating to joint-stock companies, is a species of common-law partnership.

A cost-book company has no fixed amount of capital, nor are its shares of any fixed amount, but calls are made upon the shareholders from time to time, as money is required for the purposes of the undertaking, and profits, when made, are divided amongst the shareholders in proportion to the shares held by them respectively. In the cost-book are entered also the appointments of purser or manager, or agents for the mine, and the resolutions from time to time passed at the meetings of the shareholders, and the accounts as passed and allowed thereat. In some cost-book companies, instead of a purser, a managing committee is appointed from amongst the shareholders, by whom, with the secretary, the duties which would ordinarily devolve upon the purser are performed. In the case of the South Caradon Mine there is a purser, but not a committee of management or secretary. The shares in

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a cost-book company are transferable at pleasure, without any delectus personæ, and each shareholder has the right at his pleasure to sell his shares and insist upon his vendee (subject to ss. 14, 15 and 35 of the Stannaries Act, 1869) being accepted as a member of the partnership in his place or stead. Upon a sale or transfer of shares, notice is given by the transferor to the purser or other proper officer of the company of the transfer of the shares, and by the transferee of his acceptance of them, and on such transfer being entered or noted in the cost-book the transfer is complete, and the transferee is substituted for the transferor as the holder of the shares. No deed of transfer or other written document is required. A shareholder can also put an end to his partnership by relinquishment of his shares by notice in writing delivered to the purser, or, if no purser, to the secretary for the time being, or if no secretary, to the principal agent for the time being of the company. General meetings of the company are held at fixed intervals, usually every two or three months. At such meetings calls are made or profits divided, as the case may be, agents of the mine are appointed or removed, and the general business and operations of the company discussed and considered, and any necessary orders and directions given with reference thereto. The grantees of the sett under which the mine is worked and carried on, although immediately liable to the grantors under the covenants and provisions of the deed, are considered to be only trustees for the cost-book company, whether there has been a declaration of trust in writing or not, and entitled, as between themselves and the company, to be indemnified and held harmless in respect thereof; and practically such grantees quâ grantees cannot interfere in the operations which are conducted under the authority and by the directions of the cost-book company only.

3. The shareholders of the South Caradon Mine constituting such cost-book company have, in accordance with the powers and provisions of the said deed, and for the purposes of the operations of the company, built and erected certain houses and buildings, sheds, and steam-engines, and fixed machinery, and made certain tram and other roads, and have, within the limits so granted, all necessary fixed plant, appliances, and apparatus requisite for pumping water, drawing, crushing, stamping, washing, dressing,

lifting, and conveying ores, and for the general working of the mine, and carrying on of such operations. All the houses, buildings, sheds, steam-engines, machinery, and other matters described in this paragraph, are on the surface land, and together with such land, form the subject of the rate in question.

4. The appellants, Richard Kittow and Thomas Kittow, are the surviving grantees under the deed, and are also shareholders in the company. The appellants, Christopher Childs, John Hodge Lawrence, and John Raby are three of the shareholders in the company, and Thomas Kittow is the purser of the mine.

The questions for the opinion of the Court are—

1. Whether, under the circumstances above stated, the appellants or any and which of them are rateable in respect of surface land of South Caradon Mine, with the houses, buildings, machinery, tramways, and plant, or either of them.

2. Whether the appellants or any and which of them are occupiers of the said property, and liable to be rated in respect of the same.

3. If none of them are the occupiers, then the Court to say who are the occupiers.

Lopes, Q.C. (with him, *Pinder*), for the appellants. First, on the facts stated, there was no rateable subject-matter. Secondly, the grant was simply a licence, and conferred no interest on the appellants. Thirdly, the appellants were not the occupiers, that is, the exclusive occupiers, of any part of the surface. First, nothing that is connected and occupied in connection with a mine is rateable: *Rex* v. *Bilston.* (1) *Morgan* v. *Crawshay* (2) affirmed the old law that all mines except coal-mines were non-rateable. In *Guest* v. *East Dean* (3) it appears that the Court thought that all the surface which was occupied in connection with the mine and which was not leased was not rateable.

[BLACKBURN, J. No such distinction is made in the headnote; and it was never thought of by the Court.]

In the course of his judgment Blackburn, J., says: "In the present case the greatest difficulty—and it is a difficulty which

(1) 5 B. & C. 851. (2) Law Rep. 5 H. L. 304.
(3) Law Rep. 7 Q. B. 334.

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frequently arises—is to determine what portions of this joint occupation are not part of the mine, and are to be considered as being of a rateable value." (1)

[BLACKBURN, J. I certainly was misunderstood. What I meant to say, and, I think, said, is this; at all events, the passage should run thus: "The difficulty is to determine what is the value of the portions of this joint occupation which are not part of the mine and are to be considered rateable."

LUSH, J. The doctrine supposed to have been enunciated in *Rex* v. *Bilston* (2) as to the non-rateability of anything on the surface connected with a mine has long been repudiated: *Talargoch Mining Co.* v. *St. Asaph.* (3)]

Secondly, no interest in land passed by the deed, which was a mere licence to dig: *Doe* d. *Hanley* v. *Wood.* (4) Shares in a cost-book mine are not an interest in land: *Watson* v. *Spratley.* (5) Even if the appellants were in occupation, being under a mere licence, they would not be rateable: *Rex* v. *Trent and Mersey Navigation.* (6) But *Allan* v. *Liverpool* (7) and *Smith* v. *St. Michael, Cambridge* (8), where there were similar reservations of rights of entry, &c., to the landlords, and it was held that they, and not the licensees or lodgers, were the rateable occupiers, are in point to shew that the appellants are not the occupiers.

[BLACKBURN, J. On the facts, as I understand them, the appellants, by their servants, and no one else, are in the occupation of that part of the surface which is occupied by the buildings and machinery. The partners in a mercantile house may all reside elsewhere and never come near the place, yet they would be rateable for the occupation by their servants of their business premises.]

Poland, for the respondents, was not called upon.

BLACKBURN, J. I think there is no doubt at all on any of the points which Mr. Lopes has argued. Mines were, when this rate was made, by law not rateable; that has been decided. There

(1) Law Rep. 7 Q. B. at p. 340.
(2) 5 B. & C. 851.
(3) Law Rep. 3 Q. B. 478.
(4) 2 B. & Ald. 724.
(5) 10 Ex. 222; 24 L. J. (Ex.) 53.
(6) 4 B. & C. 57.
(7) Law Rep. 9 Q. B. 180.
(8) 3 E. & E. 383; 30 L. J. (M.C.) 74.

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was an idea at one time arising from a dictum of Mr. Justice Bayley, in *Rex* v. *Bilston* (1) that, because a mine was not rateable, other things held and occupied along with it also were not rateable, going apparently on some notion that they were either part of the mine, or that, the mine not being rateable, it was illegal to rate them when occupied in connection with that mine. I certainly understood in the case which has been cited of *Guest* v. *East Dean* (2), we distinctly said and held, and if not, I am prepared to hold now, that that was a mistake; and that where there was an exclusive occupation of land, although for the purpose of assisting to work a mine which is not rateable itself, that land was as much rateable as if it were occupied for the purpose of a canteen, or for the purpose of delivering water, either of which is not of itself rateable. Then in all those cases, the value of the thing is to be ascertained in the way which was the difficulty in the case of *Guest* v. *East Dean* (2), in which we principally considered how the quantum was to be got at. In the present case I will assume in Mr. Lopes's favour, though not deciding it by any means, because there are several things which impressed me with a contrary view, but I will assume that the deed itself conveyed nothing but a licence, nevertheless, de facto, those acting under that licence have been permitted to build and erect houses and buildings, sheds, and steam-engines, and to fix machinery, and to make tram and other roads, and so, as I take it, it is a fact in this case that they are in sole occupation de facto, by their servants who work the mine, of those houses and buildings, sheds, and steam-engines, and fixed machinery, and the ground which they occupy; and all those things are above the surface of the land, and not part of the mine, and therefore they are rateable for those things; at all events, the rate as drawn up is a rate on the surface land with houses, buildings, machinery, tramways, &c., &c. The surface covering the mine I understand to be a district of some 400 acres; but apparently the claim is to rate about eight acres as being in the exclusive occupation of the appellants. If there is any portion of that not exclusively occupied by them, that will be another question, and can be put right, but if they are de facto by their servants in the

(1) 5 B. & C. at p. 853. (2) Law Rep. 7 Q. B. 334.

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exclusive occupation of this, it matters not if the law was that Norris had a right to eject them at his pleasure. Still so long as he does not eject them, but they continue in the sole and exclusive occupation of the sheds and engines, and so on, they must be rateable in respect of that occupation. The value is a question which is to be settled elsewhere, and with which we have nothing to do; and if it be that the eight acres are not in their exclusive occupation, but a diminished quantity, I should apprehend that the value would not be much affected, if at all. That is a thing we cannot deal with, as we do not know the facts. We, therefore, answer the first two questions in the affirmative, which virtually answers the third.

MELLOR, J. I am of the same opinion. I think the question is really one of fact. As soon as it is ascertained that these persons in fact have the exclusive occupation of the eight acres, with the buildings, fixed machinery, sheds, and tramways, and so on, whatever their title, though the landlord might disturb them or turn them out, does not seem to me to make any difference to the parish. The parish look to him who has the beneficial exclusive occupation. When in fact it turns out that these eight acres have been enjoyed by the cost-book mine partners, through their servants and agents, then the land becomes rateable; and the parish has nothing to do with the title; they look to the fact of beneficial occupation, and when they find it, although it may be there is no actual title which might stand against the superior title, that is immaterial to the parish. In the present case no one appears to have interfered in any way; but it appears that the servants and agents of this cost-book mine have really the enjoyment and occupation. I agree that there may be an occupation ostensibly, which is not real and actual, and not exclusive, and that would raise a very different question; but there is nothing of the sort here—nothing to shew that there was any person who had any enjoyment in point of fact of these eight acres, except the representatives of the cost-book mine. I think, on the statement of the case, though obscure, in connection with what goes before, that the land rated by the parish is the land on which these works and roads are made.

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LUSH, J. I am of the same opinion. I am sorry to hear that the case of *Guest* v. *East Dean* (1) has been misunderstood, and I cannot help saying this with some surprise, because it seems to have been supposed that the case decided that only that portion of the surface which was covered by the lease of the surface was rateable, whereas I think, if it comes to be examined, it will be found that the decision of the Court could not have proceeded on that or any such ground. The liability to be rated does not depend on the title, it depends on occupation; and whether the occupier has a right to occupy or not is entirely beside the question. All the assessment commissioners have to ascertain is whether there is actual occupation, if so, by whom is that occupation; and certainly our intention in that case was to decide, and until I heard the language criticised, I should have thought the judgment had expressly decided, that the appellants were rateable for all the surface land which was in their actual occupation. The mine itself is not rateable. It is wrong to say that an iron mine is excepted out of the statute of Elizabeth. If it had been, possibly a different interpretation might have been put on the statute; it is only that iron mines are not mentioned. A construction was put upon it at the time that iron mines not being mentioned in a taxing statute, therefore they could not be rated. The statute says: All occupiers of such and such premises (mentioning them), shall be rated as occupiers. The decision could not have been on the narrow ground that the appellants were rateable only on that portion of the surface to which they had title. In the present case there is a portion of the surface undoubtedly occupied by some one, because there are sheds, and tramways, and machinery, and so on, covering more or less the surface of the ground. They are rateable to the person, whoever it may be, who is in the occupation of them, because they are things within the statute of Elizabeth. The only remaining question is, by whom they are occupied. Surely only by those who work the mine. The persons who take up the ore from below are the servants of the mining company; they are the persons who use the buildings, and machinery, and the tramways on the surface. The company consists of a number of shareholders standing in the relation of partners to each other, but with this

(1) Law Rep. 7 Q. B. 334.

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peculiarity belonging to this class of partnerships, that they have a right to dispose of their shares. The premises being occupied by them, I think the rate was properly made.

Judgment for the respondents.

Attorneys for appellants: *Childs & Batten, for Childs & Son, Liskeard.*

Attorney for respondents: *J. Elliott Fox, for Glubb, Liskeard.*

Nov. 12.

THE PLUMSTEAD BOARD OF WORKS *v.* THE BRITISH LAND COMPANY.

Metropolis Management Acts, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250, & 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Owners of "Land"—Public Roads, Land—Conveyance—Intention not to pass Soil of adjacent Road.*

The defendants, a land company, being owners of certain lands, in 1863, laid them out for building purposes, and made roads and ways across them; and nearly the whole of the estate was sold in lots to different purchasers and conveyed to them by metes, bounds, and admeasurements, set forth on coloured plans attached to the conveyance, each lot conveyed being numbered. Each lot had a frontage upon one of the roads, and was stated in the conveyance to be on the side of the road and adjoining thereto; but, on the plan, the road was separated from the lot by a strong line, and neither the admeasurement nor colouring included the road. The roads had been dedicated to the public, as far as any act of the defendants could do so, but no proceedings had been taken to make them repairable by the parish.

The plaintiffs, the board of works of the district, from time to time paved the new streets formed by the houses on the estate, and apportioned the costs among the owners of houses forming the streets and the owners of lands bounding and abutting on the streets; and in so doing assessed the defendants in respect of the new streets and roads where bounding or abutting on the sides or ends of the streets paved as "lands abutting" on those streets, under s. 77 of 25 & 26 Vict. c. 102, and also charged the defendants in respect of two ancient highways not maintained and repaired by the plaintiffs bounding the defendants' estate, the soil of which was in the defendants:—

Held, 1. That the form of conveyance shewed that it was intended that no part of the soil of the road should pass from the defendants to the purchaser of the lot; and the case came within the decision in *Marquis of Salisbury* v. *Great Northern Ry. Co.* (5 C. B. (N.S.) 174).

2. That the defendants were properly charged under 25 & 26 Vict. c. 102, s. 77, as "owners of land" abutting on the streets; the roads being "land" within the decision of *Lord Northbrook* v. *Plumstead Board of Works* (Law Rep. 7 Q. B. 183).

CASE stated by order of nisi prius; the verdict being entered for the plaintiffs for 371*l.* 2*s.* 6*d.*, the amount claimed by the

plaintiffs from the defendants, as an apportionment of the expenses of paving certain streets in the Plumstead district.

1. The plaintiffs were and are the board of works for the Plumstead district, appointed and acting under the provisions of the Metropolis Local Management Acts, 1855 and 1862, 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102.

2. The defendants are a company constituted and formed for the purpose of purchasing land and hereditaments in Great Britain and Ireland, and of improving the same by draining and laying out and making thereon roads and other ways, and parks, gardens, pleasure grounds, playgrounds, and other places for recreation or promoting health or convenience, and of erecting suitable buildings thereon, and of selling or letting the same either before or after the erection of buildings, or the execution of works thereon, and for all other purposes incident to those before mentioned, and the said company were registered under the Joint Stock Companies Act, 1856.

3. In or about the year 1863, the defendants then being the owners of certain lands situate at Plumstead, and within the district of the plaintiffs, laid out the same lands for building purposes, and made roads and ways upon and across the same communicating with certain ancient highways outside the same lands, and also laid the sewers in such roads. The defendants' estate having been laid out in the manner shewn on the estate plan, nearly the whole of it was sold in lots to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on coloured plans. Each lot had a frontage upon one of the roads, and in the conveyance was stated to be situate on the side of and adjoining such road, but neither the measurements nor the colouring on the plan on the conveyance included any part of the roads, nor is there in the conveyance any expression indicating an intention to convey the soil of the road (1): but the defendants, nevertheless, contend that the soil of the road to the centre thereof passed by the conveyance of each lot.

4. The roads so laid out by the defendants became and were public highways, so far as the defendants could by any act of

(1) See the form of one of the conveyances given in the judgment of Blackburn, J., post, p. 24.

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theirs dedicate the same to the use of the public; and have, ever since they were made, been used by the public for all the purposes of a way, but no proceedings have ever been taken under the provisions of the Highway Acts to render them repairable as public highways by the parish of Plumstead or any other public body. In exercise of their respective statutory powers, the plaintiffs altered some of the sewers made by the defendants in the said roads, including the new streets hereinafter mentioned, and sanctioned the construction of the drains from the houses and lands abutting on the said roads and streets into the said sewers. The gas and water companies laid their mains and pipes in the said roads and streets for public and private use, and the plaintiffs have set up and used public gas lamps in the said roads and streets in the same manner as in other streets within their district.

5. Certain portions of the said roads when built upon, and before the apportionments hereinafter mentioned, became and were the several new streets mentioned in the declaration and particulars of demand in this action, and the plaintiffs, finding it necessary that such new streets should be properly paved from time to time, undertook and performed the necessary works, and also from time to time apportioned the costs, charges, and expenses among the owners of houses forming the said new streets, and the owners of lands bounding and abutting on the said new streets, and, in so doing, assessed the defendants in respect of the said new streets and roads where bounding or abutting on the sides or ends of the said streets paved, and also charged the defendants in respect of two ancient highways not maintained and repaired by the plaintiffs bounding the defendants' estate, the soil of which (at least to the centre of the ways) is assumed to have been conveyed to the defendants. One of those old ways abuts upon the east side of the Herbert Road, near to the north end thereof, and was charged to the paving thereof, and the other is called Shrewsbury Lane, and abuts upon the south-east end of Eglinton Road, and was charged to the paving thereof.

6. The roads charged as land abutting upon the sides of the streets paved are, in most cases, roads intersecting such streets. For example, in the apportionment for the paving of Herbert

Road, the roads called Ripon Road, Paget Road, and Whitworth Road are charged in respect of their abuttals on both sides of Herbert Road.

7. The roads charged as abutting on the ends of the streets paved are for the most part roads leading past the ends of such streets. For instance, in the apportionment for the paving of Llanover Road, the roads called Herbert Road and Eglinton Road are charged for their respective abuttals upon Llanover Road.

8. But in one case some of the roads or new streets charged as abutting upon the ends of the street paved are continuations of such streets. One of the resolutions was for the simultaneous paving of Fox Hill Terrace, Edge Hill Road (which extends from Fox Hill Road, up steps shewn on the plan, to Fox Terrace), and Fox Lane, and which (taken together) run out of Herbert Road at the north end thereof, and return into Herbert Road at a point about fifty yards further south. In December, 1871, the surveyor of the plaintiffs, at their instance, prepared a plan for paving those three streets, and estimated the expense of such paving in three several sums, amounting in the whole to 429*l.* 10*s.*; and the plaintiffs, by a resolution, ordered such paving to be done according to such plan and estimate, and apportioned the said sum of 429*l.* 10*s.* over the whole of the houses and lands abutting upon the three streets so ordered to be paved, and apportionments were made upon the defendants in respect of the soil of Fox Hill Terrace, for its abuttal upon Edge Hill Road, and in respect of the soil of Edge Hill Road, for its abuttal upon Fox Hill Terrace, and the like was done with Edge Hill Road and Fox Lane.

9. The defendants contend that even if the soil of highways is liable to be charged for the paving of new streets upon which those highways abut, it was not competent for the plaintiffs, under the circumstances stated, to charge the last-mentioned three roads for their reciprocal abuttals upon each other, and the defendants further contend that no public road is liable to be so charged.

The question for the opinion of the Court is whether the defendants are liable for all or any of the said apportionments.

If the Court should be of opinion that the defendants are liable in respect of all the apportionments so made by the plaintiffs, then the verdict entered for the plaintiffs is to stand.

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If the Court should be of opinion that the defendants are not liable to the apportionments made in respect of the abuttals of the two ancient ways mentioned in the 5th paragraph, then the verdict is to be reduced by the sum of 17*l.* 11*s.* on that account.

If the Court should be of opinion that the defendants are not liable in respect of the side abuttals mentioned in the 6th paragraph, then the verdict is to be reduced by 192*l.* 7*s.* 6*d.* on that account.

If the Court should be of opinion that the defendants in other cases are not liable to the apportionments made in respect of such of the roads as abut on the ends of the streets paved mentioned in the 7th paragraph, then the verdict is to be reduced by the sum of 85*l.* 19*s.* on that account.

If the Court should be of opinion that the defendants are not liable to the apportionments made for the reciprocal abuttals of Fox Hill Terrace, Edge Hill Road, and Fox Lane, mentioned in the 8th paragraph, then the verdict is to be reduced by the sum of 20*l.* 5*s.* on that account.

If the Court should be of opinion that the defendants are not liable to any of the apportionments made by the plaintiffs in respect of the said roads, the verdict of the plaintiffs is to be set aside, and a verdict entered for the defendants with costs of suit.

Barrow (with him *Morgan Howard, Q.C.*), for the plaintiffs. The question is whether the defendants are liable to contribute to the paving of these new streets as owners of land abutting upon them within 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77 (1), by reason of their ownership of these roads. First, it is

(1) By 18 & 19 Vict. c. 120, s. 105, the expenses of paving a new street are to be charged on the owners of houses forming such street. By s. 250, the word "owner" shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used. By s. 110 of 25 & 26 Vict. c. 102, the two Acts are to be construed together as one Act.

25 & 26 Vict. c. 102, s. 77. Where any vestry or district board shall, under the powers given by s. 105 of 18 & 19 Vict. c. 120, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein; provided that it shall be lawful for the vestry or district

said by the defendants that the soil of the roads is no longer in them, but passed usque ad medium filum by the conveyance to the owner of each lot.

[THE COURT intimated that they were of opinion with the plaintiffs on this point.]

Secondly, these roads have not become public highways.

[BLACKBURN, J. No formal act of dedication is necessary: the statement in paragraph 4 of the case is explicit, that they have become public highways, though not repairable by the parish.]

Thirdly, even if they are public highways, still the principle of *Lord Northbrook* v. *Plumstead Board of Works* (1) applies to a public highway just as much as to private roads; in either case there is a mere easement over the surface, and the defendants, as owners of the adjoining property, get just the same advantage in selling their houses better in consequence of the formation of the roads. The defendants have, therefore, all the beneficial ownership necessary to render them liable to contribute as owners of land abutting on the streets to be paved. Lastly, no question as to the quantum assessed is raised.

[*Prentice, Q.C.*, contrà, assented.]

And it is not now open to the defendants,—if they could have ever said so,—to say that the plaintiffs have proceeded in an erroneous or oppressive manner; it is clear that if roads can be "land" within the meaning of the Acts, these roads, wherever they crossed the streets to be paved, abutted on them.

Prentice, Q.C. (with him *G. Shaw*), for the defendants. First,

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board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.

(1) Law Rep. 7 Q. B. 183.

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the soil of the roads passed, usque ad medium filum, to the purchasers of the adjoining plots. There must be distinct words to shew a contrary intention in order to avoid this implication: *Lord* v. *Commissioners of Sydney* (1); *Simpson* v. *Dendy*. (2) In *Berridge* v. *Ward* (3) there was a reference to a plan annexed, the measurement and colouring of which excluded the highway, and yet the general words were held to pass the road usque ad medium filum.

[BLACKBURN, J. One of the conveyances has been handed up to the Court, and it is very like that in *Marquis of Salisbury* v. *Great Northern Ry. Co.* (4), in which it was held that an intention not to pass any of the soil of the road was shewn by the form used. It may be very desirable to the defendants to retain control of the roads, so as to be able to keep them up for the benefit of the rest of the property; and they by this means derive a benefit from the roads.]

Secondly, the defendants are not "owners of land" within s. 77 of 25 & 26 Vict. c. 102, as interpreted by s. 250 of 18 & 19 Vict. c. 120. The plaintiffs have charged the defendants, as owners of land wherever the roads intersect the streets to be paved, and in some instances there are several intersections by the same road, and the defendants are charged as owners of the land on both sides. It never can have been the intention of the legislature by the enactment in s. 77 to make the owners of public highways liable. The roads derive no benefit from the repair of the streets.

[BLACKBURN, J. In the case of old highways that may be so, because the owners of the soil may have no beneficial interest in them at all; but the proportionate amount they are to pay is not before us, and we must assume that this building company do make a profit or derive an advantage from the ownership of these highways, as they may have a great deal of land unbuilt upon, and the value of this land which they have to sell would be enhanced by the roads being kept in good repair.]

That may be the case with any highway.

(1) 12 Moo. P. C. 473.
(2) 8 C. B. (N.S.) 433.
(3) 10 C. B. (N.S.) 400, 415; 30 L. J. (C.P.) 213.
(4) 5 C. B. (N.S.) 174; 28 L. J. (C.P.) 40.

[BLACKBURN, J. No doubt where the owner of the highway is also the owner of the adjoining land.]

By the definition of "owner" in s. 250 of the first Act he is to be the person in the receipt of the rack rent. In *Angell* v. *Paddington* (1) it was held that a church was neither house, within s. 105 of 18 & 19 Vict. c. 120, nor land, within s. 77 of 25 & 26 Vict. c. 102.

[BLACKBURN, J. Because the church commissioners could not be said to be owners; but in a later case it was held that vacant land by the side of a railway was land within the Act.]

That was in the case of *Higgins* v. *Harding* (2); but that is very distinguishable from the case of highways, for which no rent can be received.

[BLACKBURN, J. That argument was urged for the appellant without avail in *Lord Northbrook* v. *Plumstead Board of Works*. (3)]

The case of a public highway is very different from that of private roads.

[BLACKBURN, J. I cannot see any difference in principle. In *Bowditch* v. *Wakefield* (4) the trustees of a school out of which no profit could be made as a school were held to be owners.]

But it might be let profitably; here it is impossible that any rent can be obtained. Lastly, the defendants are assessed in respect of ancient highways where they have no property.

[BLACKBURN, J. That affects a sum of 17*l.* only, and the quantum apportioned is not before the Court; nor, indeed, does it appear in what way the persons aggrieved can appeal from the apportionment. That point, however, does not arise in the present case.]

Barrow in reply.

BLACKBURN, J. It seems to me, the case clearly enough ought to be decided in favour of the plaintiffs on all the points. In the first place, it is said that the soil in these roads was not in the defendants. I will take one of them as an instance: it is said, that the soil adjoining the houses of Cantwell Road is conveyed away from the building company, who were the owners of both it and

(1) Law Rep. 3 Q. B. 714.
(2) Law Rep. 8 Q. B. 7.
(3) Law Rep. 7 Q. B. 183, 192.
(4) Law Rep. 6 Q. B. 567.

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the houses, to the owner of each lot. Now the description, as given in the body of the case, of the terms of conveyance is not very precise or clear; but one of the original conveyances has been handed up to us and is as follows: "In consideration of 108*l.* the company do hereby grant and convey unto the purchaser and his heirs all that piece of land situated in the parish of Plumstead, on the north-west side of and adjoining a road there, called Cantwell Road, and which piece of land is part of an estate which was offered for sale by public auction by Mr. Whittingham, at the Town Hall, Woolwich, in twenty-nine lots, according to certain printed particulars and a lithographed plan published therewith, in which particulars and plan the said piece of land was distinguished as lot 368, and the position and extent of this piece of land are indicated by the plan hereon, whereon the site of it is coloured pink." When we look to the plan attached to this conveyance, and which was intended to be copied from the original plan referred to, we find that lots 369, 368, and 367 are adjoining each other, and are pointedly and carefully marked out, so as to include no part of Cantwell Road at all, and are separated from it by a strong line. Then Mr. Prentice contends and cites cases to this effect, with which I quite agree, that where there is a plot of land conveyed adjoining to a road or river, the primâ facie presumption is that up to the medium filum aquæ or viæ, whichever it may be, belongs to the purchaser, and it is not enough to rebut that presumption to say that it is designated as adjoining to or abutting on that road or river, and this even if there was a mention of the acreage. But, on the other hand, it is said to be enough, and always has been held to be enough, when there is anything to shew that it was not the intention to convey any part of the road. I have great difficulty, upon looking at this case, in seeing, unless express negative words were introduced saying no part of the road shall be conveyed, how they could have expressed their intention more plainly. I therefore certainly think that the defendants remained the freeholders of the portion of land over which they have dedicated roads, and allowed the public to use the roads. They are owners of it in that way and it is dedicated to be a public way not repairable by the parish and the public have a right to use it.

Then comes the question, does that prevent the defendants being owners of land within the meaning of the statute, so as to make them liable to have the repairing and paving of the neighbouring streets apportioned to them as owners of the adjoining land? On that Mr. Prentice endeavours to argue that, inasmuch as the definition of owner is said to be a person who shall receive the rack rent, therefore it must be land so occupied and held that it is capable of being let. But that, I think, is not so. In the first place, in the case of *Lord Northbrook* v. *Plumstead Board of Works* (1), that very objection was taken, and is decisively overruled. Lord Northbrook there had laid out different portions of his estate for building houses, very much like the present case. He had laid out portions of it in streets also, but he had not,—as is very common with building owners,—he had not made these streets into public streets. He had kept them to himself, just as the Duke of Bedford, and Mr. Lowndes, and other freeholders of squares in London had done. He kept them to himself, as private roads; but he had granted to those to whom he had sold the land and houses adjoining the right to the use of the roads as private ways. It was argued that he could not be rateable in respect of those roads. Cockburn, C.J., says: "These pieces of land forming the soil of the roads, if still occupied in the ordinary way, would be liable to the rate. Why are they to be exempted because they are converted into roads? Either Lord Northbrook receives direct compensation for the use of the roads in the shape of payment, or has the advantage of such roads for the occupiers of his property, which enhances the value of the houses which he lets; and he therefore gets compensation for the loss of this land, as regards the purposes for which otherwise it would be applicable, in the shape of rents that he gets for those houses. Lord Northbrook has, therefore, the valuable use of these roads, and there is no reason why he should not contribute to the expense of paving the street upon which these roads abut, just as if the roads were land used for agricultural or other purposes." Then I observe upon the same thing and say, "*Bowditch* v. *Wakefield Board of Works*" (2) (which was mentioned in the argument and argued on there as it has been

(1) Law Rep. 7 Q. B. 183. (2) Law Rep. 6 Q. B. 567.

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here) "seems to be in point. The question there was whether a trustee of a school was liable to the expenses of paving the street along which the school fronted. It was argued that, as he was a bare trustee, and could not let the school or derive any profit from it, he ought not to be held liable. But there was no reason for holding that a building used as a school should not be rated. The trustee was owner of the land, and would probably get back the expenses from those for whom he was trustee. I cannot see why, in the present case, Lord Northbrook is not the owner of land merely because he chooses to use it for an artificial purpose." (1) I suppose "artificial purpose" is hardly the word I could have used: probably a limited purpose, or a peculiar purpose.

8 Appl Ca 694

In this case the only difference is, that the roads have been dedicated to the public, instead of the use having been granted to private proprietors. I do not think that makes any difference. When the plaintiffs come to consider what sums they should apportion, they ought to consider, I should say, what is the benefit derived, and if the case was, as we suggested in Lord Northbrook's case, that these roads were very valuable to the defendants, and that the paving of the road would be very advantageous, because, in consequence of the street being put into good order, the building land which the defendants still retained in their hands would be enhanced in value; and, in that case, the proportion that should be assessed would be greater. If there was not this advantage the proportion should be smaller. One can conceive if they had disposed of all the adjoining land, and had no longer any interest in any unsold land, the keeping of these roads in repair would be of no value to them; and I certainly was struck with what had been done with reference to the ancient highways. If it were open to us to consider that apportionment, I should consider it should be only a nominal sum; but no question of apportionment is reserved for us. The question is entirely whether, in respect of these pieces of ground which the defendants have dedicated to the public and which are public ways, there should be apportioned anything upon them at all, and I certainly think the whole may be assessed at some amount or other; and,

(1) Law Rep. 7 Q. B. at pp. 193, 195.

therefore, I think the plaintiffs should have judgment for the whole. I do not wish to express any doubt. In all probability the sums may be all perfectly fair and proper. The only thing that strikes me as any ground for doubting about is as to the apportionment upon the ancient highway; although it is only a small matter of 17*l.* odd, I have some doubt whether, if the apportionment was open, that is quite right.

ARCHIBALD, J. I am of the same opinion. I agree entirely as regards the first point, that on the construction of these conveyances they were not sufficient to pass the road. While I agree that the presumption, upon a grant, in general words, of land abutting upon an ancient highway, would be that the road ad medium filum would pass under the conveyance; yet I think there is sufficient in these conveyances to show clearly that it was not intended at all to pass. Upon the other point as to whether the defendants were owners within the meaning of s. 77, we have first to be guided by the decision in the case of *Lord Northbrook* v. *Plumstead Board of Works.* (1) There it was clearly decided under similar circumstances, with the exception that those were private ways, that Lord Northbrook was "owner of land." I can see no difference between the case of a public and a private way. There is practically just as much an easement over the land. In the case of a private way, Lord Northbrook would have no more benefit or enjoyment of that land than if it had been public. I see, therefore, no difference in that case, and I think for the reasons with which I entirely agree, given by my Brother Blackburn, that this was a case in which the defendants were owners within the section. I also concur in what has been said with regard to the ancient highway. The mere question of amount is not for us, the principle is all we have to decide.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Newman, Dale, & Stretton.*
Attorneys for defendants: *R. & A. Russell.*

(1) Law Rep. 7 Q. B. 183.

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Dec. 10.

SAMPSON, JUDGMENT CREDITOR, *v.* THE SEATON AND BEER RAILWAY COMPANY, JUDGMENT DEBTORS.

THE LONDON AND SOUTH WESTERN RAILWAY COMPANY, GARNISHEES.

Attachment of Debts—Debts between Judgment Creditor and Garnishee—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 63.

10 QB 592

Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 61, 63, where a debt due from the garnishee to the judgment debtor has been attached, the garnishee has no right to retain the amount of any debt due to him from the judgment creditor, and the judge must order execution to levy the whole amount due from the garnishee to the judgment debtor.

MOTION on behalf of the garnishees for a rule to shew cause why an order of Blackburn, J., for execution against the garnishees as to the sum of 21*l.* 1*s.* 11*d.*, should not be rescinded.

Nov. 25. *C. W. Wood, Q.C.*, in support of the motion.

McIntyre, Q.C., shewed cause in the first instance.

The facts and points are fully stated in the judgment of the Court.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Cockburn, C.J., Lush and Quain, JJ.), was delivered by

LUSH J. The question involved in this case is one of some nicety and importance. One Sampson had obtained judgment upon an award against the Seaton and Beer Railway Company for a sum of 238*l.* 11*s.* 5*d.*; compounded of 190*l.* 0*s.* 8*d.* for debt, 13*l.* 2*s.* 0*d.* for costs, and a moiety of 70*l.* 17*s.* 6*d.*, the arbitrator's charges. The last-mentioned sum had been advanced as a disbursement by Messrs. Purkis and Perry, Sampson's attorneys, in order to take up the award, and they claimed a lien on the judgment for their costs which included this disbursement.

The Seaton and Beer Railway is worked by the London and South Western Company, and the latter company had in their hands a sum of money due to the Seaton and Beer Company exceeding the amount of Sampson's judgment. An execution against the effects of the Seaton and Beer Company having been

returned nulla bona, Sampson obtained a garnishee order attaching the money in the hands of the London and South Western Company, and calling upon them, in the usual way, to shew cause why they should not pay to Sampson so much of that money as would satisfy his judgment.

At this time Sampson was indebted to the London and South Western Company in 21*l.* 1*s.* 11*d.* for carriage, which he had promised to pay as soon as he should have settled his claims against the Seaton and Beer Company.

Upon the hearing of the garnishee summons it appeared that a claim had been made as against Sampson by Sir Walter Trevelyan to a lien on the debt due to him from the Seaton and Beer Company for advances made by him to Sampson; and the London and South Western Company claimed to be relieved by interpleader from these conflicting claims. An interpleader summons was thereupon issued, and in the result an order was made directing a special case to be stated as between Trevelyan and Sampson. The case was argued in last Trinity Term, and decided in favour of Trevelyan. An order was thereupon made directing the London and South Western Company to pay to Trevelyan the 190*l.* 0*s.* 8*d.*, and to pay the balance, namely, the costs and moiety of the arbitrator's fees, to Messrs. Purkis and Perry in discharge pro tanto of their lien.

The London and South Western Company, not being parties to the special case, had no opportunity, on the hearing of it, of insisting on their claim to retain the 21*l.* 1*s.* 11*d.* due to them from Sampson; but it is clear that they never intended to give it up, and that nothing was done by them to waive their right, if it existed. On the other hand, Purkis and Perry had done nothing to discharge or weaken their lien on the judgment for their costs.

The London and South Western Company paid Trevelyan, but refused to pay the balance to Messrs. Purkis and Perry, claiming to retain out of that balance the 21*l.* 1*s.* 11*d.* due to them from Sampson. Purkis and Perry took out a summons for leave to issue execution; and upon this an order was made for payment to them forthwith of 31*l.* 12*s.* 0*d.* (the balance and interest after deducting 2*l.* 2*s.* 0*d.* costs), and referring to the Court the question whether

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or not under these circumstances the London and South Western Company were entitled to retain the debt due to them from Sampson. (1)

The argument before us was addressed mainly to the right of priority between Purkis and Perry and the garnishees; but before coming to this question it is necessary to determine whether, if no claim had been set up by either Trevelyan or Purkis and Perry, the London and South Western Company could have claimed a right to retain as against Sampson the amount of his debt to them; in other words, whether a judge could have refused to make an order for execution against the garnishees, except on the terms of Sampson consenting to their retaining out of the money due from them to the judgment debtor the amount of his, Sampson's, debt to them. We are of opinion that the judge could not have imposed such a condition.

The right to attach a debt owing to the judgment debtor by a third party is a species of execution against the property of the judgment debtor. For the purpose of this new remedy given by the Common Law Procedure Acts, the debt is made equally available to the judgment creditor as property seizable under a fi. fa.; and his rights are as ample in the one case as in the other. The machinery provided for determining questions of disputed liability has reference solely to cases where the garnishee disputes his liability to the judgment *debtor*. And although we have no doubt that the state of accounts between the garnishee and the judgment debtor may and ought to be gone into, so that the garnishee may not be in a worse position than if he had been sued for his debt by the judgment debtor, the case is different as between him and the judgment creditor. There is no place for the discussion of cross claims between the garnishee and the judgment creditor. If it had been intended to let in such claims, some mode of adjusting them in case of dispute would have been also provided. But there is none.

The words of s. 63 of the Act of 1854 appear to us clearly to define what is the right of the judgment creditor: "If the garnishee

(1) The order was, "that execution do issue for 21*l.* 1*s.* 11*d.* on the 5th day of next term, unless the Court otherwise order, which I refer to the Court."

does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt." All that the judge has to do is to decide whether the circumstances are such as to make it right and just that the garnishee should pay, and that the judgment creditor should have execution against him. Having decided against the garnishee, the judge cannot go on to settle the accounts between him and the judgment creditor, nor to impose, as a condition of granting the remedy to which the statute entitles him, that he shall pay what he may owe to the garnishee.

It is, therefore, unnecessary to determine the other questions.

As the point was referred to the Court, and is a new one, we think there should be no costs.

The order of Blackburn, J., will stand for execution to issue unless the 21*l.* 1*s.* 11*d.* be paid within a week.

Rule accordingly.

Attorney for garnishees: *Crombie.*

Attorneys, contrà: *Purkis & Perry.*

THOMAS *v.* THE QUEEN.

Nov. 20.

*Petition of Right, when it will lie—Unliquidated Damages for Breach of Contract—*23 & 24 *Vict. c.* 34.

A petition of right will lie for a breach of contract resulting in unliquidated damages.

So held on the authority of the *Banker's Case* (14 How. St. Tr. 1).

19 E & B 549
16 Q.B.D. 490
24 Q.B.D. 70

THIS was a petition of right.

1. That previously to the year 1859 the suppliant had devised and invented a system of heavy rifled artillery, and desired that the same should be introduced into and adopted by the public departments of Her Majesty's service, and that the suppliant having

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subsequently had various interviews and correspondence upon the subject with the then secretary of state for war, it was mutually agreed by and between the suppliant and the secretary of state for war that in consideration of the suppliant referring such invention to the ordnance select committee at Woolwich, and of such committee receiving from the suppliant such descriptions and drawings or models as might be necessary for their elucidation, to be retained for future reference and to enable the committee to give an opinion on the subject, and of the suppliant attending the committee in order to give his personal explanation, that in the event of the invention being approved of, and being adopted in Her Majesty's service, a reward in that behalf should be given by Her Majesty's government to the suppliant, and that the amount of the reward should be determined by Her Majesty's master-general and board of ordnance. Averment that all conditions precedent have been fulfilled, yet the amount of the reward had not been determined, nor had the same or any part thereof been paid to the suppliant.

2. That the suppliant having invented certain artillery constructed upon a new principle, and having in his possession certain plans and drawings explaining the same, and having incurred heavy costs, charges, and expenses in perfecting the invention, in consideration of the suppliant shewing and delivering up his plans to Her Majesty's government, Her Majesty's government promised the suppliant that, in the event of certain trials then about to be made of the artillery shewing a successful result as far as the principle was concerned, the expenses to which the suppliant had been put should be reimbursed to him by the government. Averment that all conditions precedent had been fulfilled, yet Her Majesty's government had not reimbursed the sum to the suppliant.

Demurrer to the petition of right and the two paragraphs thereof. Joinder in demurrer.

June 8, 9. *Sir R. Baggallay, A.G.* (*Holker, S.G.*, and *C. Bowen* with him), in support of the demurrer.

W. Williams, Q.C., contrà.

The arguments and authorities cited appear in the judgment.

Cur. adv. vult.

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Nov. 20. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. This is a petition of right alleging, in two counts, promises made on behalf of the Queen, and breaches of those promises, to which the Attorney General demurs.

Several objections are made in the points delivered as to the form of the counts, and the absence of sufficient allegations that those who made the promises had authority to contract on the behalf of Her Majesty; some of which, especially as applied to the second count, might probably have forced the suppliant to amend, but the Attorney General, on the argument, declined to press any objection which could be cured by an amendment; and the question argued before us was that concisely and properly stated in the first and second points of argument delivered, viz.: That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for breach of contract, nor to recover money claimed either by way of debt or damages.

We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts on which the suppliant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person's authority. On these points we express no opinion. Contracts can be made on behalf of Her Majesty with subjects, and the Attorney General, suing on her behalf, can enforce those contracts against the subject; and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases. But it is quite settled that on account of her dignity no action can be brought against the Queen; the redress, if any, must be by petition of right, which is now regulated by 23 & 24 Vict. c. 34. If the suppliant ultimately recovers, he obtains, under s. 9, a judgment of the Court that he is entitled to such relief as the Court shall think just. And this form of judgment would be applicable to the case in which it appeared to the Court that the plaintiff was entitled to be paid damages for the non-fulfilment of a contract.

It appears that at the time of the passing of the Act there was a general impression that a petition of right was maintainable

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for a debt due or a breach of contract by the Crown; the opinion to that effect expressed in Lord Somers' argument in the *Banker's Case* (1) (to which more particular reference will presently be made) had been adopted by Chief Baron Comyns (2), and by Serjeant Manning, in his treatise on the Practice of the Court of Exchequer, where he says, at page 84, that "Chattels personal, debts, or unliquidated damages, may be recovered under it;" and it is well known that the case, by which attention was particularly directed to the unsatisfactory nature of the procedure, and which led to the passing of the Act (vide letter of Mr. Archibald to Sir W. Bovill) was the case of *Von Frantzines* v. *Reg.*, in which a petition of right had been presented in the old form upon a contract for the supply of provisions to the British fleet, in which it never appears to have occurred to the then Attorney General, Sir R. Bethell, to question the right of this suppliant to sue by petition for breach of contract. Indeed, the framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels must for the future be exceedingly rare.

But the 7th section of the Act expressly provides that "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

We are therefore called upon to determine the correctness of the general impression referred to, and whether before that statute a petition of right lay in respect of the non-fulfilment of a contract made by the authorized agent of the sovereign.

There is no statute that gives any such right, which, if it exists, does so at common law; and unfortunately the authorities to which we must have recourse are many of them antiquated and connected with forms of procedure with which no one now alive is familiar, and which we now approach with diffidence, as they may be misapprehended by us.

The argument against the petition of right lying in such a case

(1) 14 How. St. Tr. at p. 39. (2) 1 Com. Dig. Prerogative D. 78.

is, we think, entirely grounded on the absence of ancient precedents. And that is undoubtedly a strong argument. All the entries in the ordinary courts that have been brought to our notice are (with the exception of the *Bankers' Case* (1) and *Wroth's Case* (2) on which it proceeded, as to which we shall observe presently) entries of petitions in the nature of a real action to recover freehold land or a freehold rent issuing out of land; and in all the judgment is that of "amoveas manus." And in *Wroth's Case* (2) and the *Banker's Case* (1), in which the judgment was different, the annuity recovered was a freehold annuity. It is too much to say that all the entries existing must have been of this nature; a search in the Petty Bag, where the records of these proceedings are kept, might possibly be rewarded by finding some in which there was a judgment in respect of a debt due from or a covenant made on behalf of the Crown. But none such have been produced; and the inferences sought to be deduced from the absence of precedents are, either that in the early times, when the remedy by petition of right was formed, it was confined to cases in which the freehold was concerned, that being the only interest then of sufficient consequence to lead to the framing of a remedy; or that from respect to the King the remedy was confined to cases in which redress could be granted by an order to the King's officers to withdraw; and did not extend to cases in which, unless the King chose to pay, there could be no effectual relief unless the King's treasure or lands and chattels were taken in execution; and that it could not be supposed that a judgment would be given which could not be enforced.

We must observe, as to this last argument, that the moral effect of such a judgment, though it could not be enforced, must at all times have been great, and, without adopting the whole of the polite fiction of the law which, as stated by Blackstone, 2 Com. p. 225, presumes that to know of any injury and to redress it are inseparable in the royal breast, we may say that at all times the refusal of the Crown to pay its just debts was much more likely to be based on a sincere or pretended denial on the part of the Crown's advisers of the justice of the debts than on a barefaced

(1) 14 How. St. Tr. 1. (2) Plow. 452.

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avowal of an intention to avail themselves of the power to refrain from doing right.

But we think that, in at least one important branch of the law, there is sufficient authority that a petition of right lies where the judgment could not have amounted to more than a declaration of the title to redress, leaving it to the Crown to give that redress afterwards.

In grants of real estates in the old times there was generally a warranty or covenant real by the donor to the donee. And if the donee was sued in a writ of right he might vouch his warrantor, who was then bound to defend the action. If judgment went against the vouchee, the demandant recovered the land, and the tenant had judgment against the vouchee for recompence in value for the lands he lost. If the donee was deprived of the lands in a possessory action where voucher was not permitted, his remedy against the donor who had warranted the title was by warrantia chartæ: see 1 Fitz-Herbert de Naturâ Brevium, p. 134. But in cases where the king had granted lands with a warranty, it is declared by the Statute de Bigamis, 4 Edw. 1. c. 1, that, where the tenant prayed aid of or vouched the king, the suit should be stayed until a writ of procedendo was awarded. This writ of procedendo, Lord Coke (2 Inst. p. 269) says, is a writ which the king ex merito justitiæ ought to grant.

No records have been brought to our notice shewing the mode in which proceedings were taken in Chancery to obtain the writ of procedendo, though the cases in which the question must have risen are very numerous: see the title "Aide de Roy," in Fitz-Herbert's Abridgment; but one may suppose them to have been much in the nature of those in Chancery in a petition of right. When the procedendo was awarded, if the tenant could make no defence against the demandant, he would, where the grant of the Crown contained a warranty, lose the land, and have the same right against the Crown to recompence in value which he would have had against his vouchee, if a subject; but he would not have the same remedy. In such a case he could, however, sue for recompence in value by petition of right. This is proved by the case of *Earl of Warwick* v. *Duchess Dowager of Clarence.* (1)

(1) Year Book, 9 H. 6 Pasch. pl. 7, folio 3.

There the earl, having brought formedon against the duchess, she pleaded that she held the land for life, the reversion in the king, and prayed aid. She had not in her plea alleged that she held by a grant from the Crown in which there was a warranty, and it appears, from the report of the case in Hilary Term (6 H. 6 pl. 11, folio 25), that this was done advisedly, the duchess's counsel not being then prepared to make profert of the original grant to her from the Crown; and on that objection being made, amending their plea. A writ of procedendo having been awarded, the tenant vouched the Earl of Somerset, and it was objected that the duchess had already got a right to a recompence in value by petition of right, in consequence of her voucher of the king, and, if she was permitted to vouch another, might have double recompence in value. Paston, who was then a judge, points out that the aide prayer in this case was, or, for all that appeared on the record, might have been only on account of the feebleness of her estate, and not "with the intent to have value in the nature of voucher;" and the clerks being appealed to, certified that the established mode of pleading was "that in case the king grant to a man in fee with a warranty, or if he grant a recompence, and the tenant be impleaded and prays Aide de Roy, and this is in the nature of a voucher, then the special matter must be entered, or otherwise he shall have no advantage to have the value by petition of right," &c. "Diversitas bona," says the reporter.

The Earl's counsel then counterpleaded that the king's father, Henry V., was seised in fee, and by his letters patent granted the land to the duchess for life, and then died, and the reversion descended to the now king; and so by her aide prayer she had value by petition, and demanded judgment if she could, after that, have voucher. The counterplea is, however, as we understand the case, held bad on the ground that the tenant had an option whether to vouch the king or not, and had lost it; "for it is the folly of the tenant who vouched not when he prays aide." The importance of this case is, that it shews that then it was so well established that a petition of right lay in the nature of voucher or warrantia chartæ as to have given rise to a settled mode of pleading. On such a petition the judgment could not have been an amoveas manus, but must have been either a dry judgment

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that the suppliant had a right to recompence in value, or one giving an execution against the land of the king. Should the present case be taken into the Court of Appeal, it will be desirable to search the records to see what was the form of judgment in a petition of right in the nature of voucher.

And as to the other objection that the petition of right was only in cases where the freehold was concerned, there is the dictum which has been so often cited from the Year Book, 34 H. 6 Trinity, pl. 18, f. 51, in the case of *Rex* v. *William Hoove*, which, though only a dictum, has been adopted by Stanford. (1) There, in the course of arguing, Wangford says: "You cannot have a petition of right unless in respect of land. Quod fuit negatum per omnes justiciarios, who said that in many cases a man shall sue by petition to have back his goods and chattels." Against this is to be put the dictum in 1 H. 7, folio 3, pl. 3, not in any judicial proceeding, but at a meeting of all the judges, to advise what amendments in the law should be proposed in Parliament. Amongst others, an amendment in the law as to traverse of office seems to have been discussed, in the course of which Catesby says that "petition at common law lies not, unless of a freehold at least, to which Hussey assented." Of the two dicta it seems to us that the opinion expressed, though unnecessarily, in a judicial proceeding is entitled to most weight. The entries in the Rotula Parliamenti shew that in the reigns of our early kings petitions relating to almost everything were brought before the king in Parliament. Lord Somers, in the *Bankers' Case* (2), treats it as clear that the various petitions he cites from Ryley were petitions of right, whilst Lord Holt seems to think them petitions of complaint. Lord Coke, in the 4 Inst. 11, says of petitions in Parliament, "some be of right, some of grace, and some mixt of both."

No one who looks at the rolls as published by the record commissioners, can fail to see that very many of the petitions in the times of Edward I. and Edward II. were not in the nature of suits at all, whilst many look very like suits. It seems to have been in those times unsettled whether parliament was not a Court of original jurisdiction; later, it was settled that it was not.

(1) Stanford's Exposition of the King's Prerogative, ch. 22, p. 76.
(2) 14 How. St. Tr. 1.

We should be sorry if obliged to form an opinion on so obscure a matter as a ground for our decision, especially when such great authorities have differed upon it. And we think it is not necessary so to do. For, in our opinion, the reasons given by Lord Holt in favour of the judgment which was ultimately adopted by the House of Lords, as well as the reasons given by Lord Somers for reversing it, both lead to the conclusion that a petition of right lies in such a case as the present.

As our judgment proceeds mainly on the authority of the *Banker's Case* (1), we think it right to state that case somewhat at length. Charles II. had, by letters patent under the great seal, granted to the bankers who had been deprived of their money by the shutting of the Exchequer, and to their creditors, annuities in fee, at the rate of six per cent. on the moneys thus detained. These annuities were charged on the hereditary revenue of the excise. No pains had been spared to make the letters patent as binding as possible. They contained inter alia a covenant from the king for himself, his heirs, and successors, under the great seal that due payment should be made, and that if there was any defect in these letters patent the king, his heirs and successors, would make a further grant; and the treasurers, &c., were commanded to give to the patentees tallies, and to pay them. The annuities were paid for four years, and then the further payment ceased. During the reigns of Charles II. and James II., the bankers took no steps at law to enforce their claims, but in the first year of William and Mary (1689), when, as Lord Somers suggests, it had become safe to sue the Crown, they commenced proceedings. If, under a petition of right, they could only have obtained a bare declaration of their right to be paid, then they would have got little more than they had already, inasmuch as the letters patent already contained under the great seal as strong a declaration of the patentees' rights as could be devised. And in *Wroth's Case* (2), they found a precedent in which, on a petition to the Barons of the Exchequer, judgment had been given against the Crown, that the letters patent creating the annuity should be enrolled, and execution in the shape of a writ, commanding the treasurers and chamber-

(1) 14 How. St. Tr. 1. (2) Plowd. 452.

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lains of the Exchequer to pay the annuity and its arrears. This precedent the patentees in the *Banker's Case* (1) followed. The Attorney General demurred to their petition. The majority of the Exchequer gave judgment against the Crown in the same form as in *Wroth's Case.* (2) Then error was brought before the Lord Keeper, assisted by the advice of the justices of either bench. By this time, Treby, who, as Attorney General had demurred and brought the writ of error, had become Chief Justice of the Common Pleas, and Somers, who, as Solicitor General had argued for the Crown in the Exchequer, had become Lord Keeper. And the Lord Keeper, with the concurrence of Treby, Chief Justice of the Common Pleas, and against the opinion of Holt, Chief Justice of the Queen's Bench, and the six puisne justices, reversed the judgment in the Exchequer. The modern etiquette, by which a judge who has been counsel in a cause abstains, if possible, from taking any part in the judgment on it, seems not then to have been thought of, and no comment seems to have been made at the time on what would now be the subject of much remark. The judgment of the barons below, and the arguments of the six puisne judges on the appeal have nowhere been preserved. There is in 5 Modern Rep. at pp. 46, 53, a very imperfect note of Treby's argument delivered in Trinity Term, 7 Wm. 3 (June, 1695), and of Holt's argument delivered in Michaelmas Term, 7 Wm. 3 (November, 1695), of which there is a fuller, though still an imperfect report, in Skinner's Reports, p. 601. In parts it is a reply upon Treby's argument. Lord Somers took several months to prepare a very elaborate judgment, which he delivered in Trinity Term, 8 Wm. 3 (June, 1696). This was published at the time under the title of Lord Somers' argument, and is reprinted in the fourteenth volume of the State Trials, p. 39. It is avowedly a reply upon Holt. The judgment was taken by appeal to the House of Lords, and there reversed, and the judgment of the Exchequer affirmed. Holt had there an opportunity to answer Lord Somers, of which he probably availed himself; but, as at that time the publication of what passed in the House of Lords, even in a judicial proceeding, was strictly prohibited, there is no report now extant of what passed.

(1) 14 How. St. Tr. 1. (2) Plowd. 452.

After all, the execution against the treasurer and chamberlain seemed to have proved unproductive, and (not much to the honour of the government), the bankers were obliged to compromise by accepting 10s. in the pound, secured by stat. 12 & 13 Wm. 3, c. 12, s. 15. We are at present only concerned with that part of the arguments in the *Banker's Case* which bears on the question whether the patentees had a remedy by petition of right.

Treby, C.J., expresses his opinion to be that the letters patent of Charles II. bound the hereditary excise in the hands of the King's successors, and consequently that the patentees had a right to be paid, and as may be inferred from what Holt says in answering him, that they might by petition of right have that right declared, for which he seems to have cited *Everle's Case*. (1) He seems to have denied that the barons had any original jurisdiction in such a case, or could interfere, unless the case was sent to them by the Crown on petition of right; but he seems mainly to have argued that though there was a right in the creditors of the Crown, they had no remedy at law to enforce that right. "I take it," he says, "that the treasurer may, if he pleased, pay these annuities to the petitioners, but whether he will do it or not is left to his conscience and discretion; but he cannot be compelled to it but by authority of parliament." (2)

Holt, C.J., after giving his reasons for holding that the letters patent bound the King's successors, proceeds to discuss the question of the remedy (3): As to the remedy, he held also that the patentee had taken a proper remedy; he said that all his Brothers had agreed that he had a legal right, and therefore had a legal remedy, and it is vain to have one without the other, and he said first that monstrans de droit and petition of right were the remedies in such case at common law, and the party in this case is not put to his petition of right. A petition of right is not necessary, though if he will admit himself out of possession he might have a petition of right. He then proceeds to argue that the petition of right was not necessary because the patentees' title already appeared on record.

As to *Everle's Case* (1) he seems to admit that there might in

(1) Ryley's Pl. Parl. 251 (33 Edward I.); 1 Rot. Parl. 164, No. 52.

(2) 5 Mod. at pp. 46, 48.

(3) Skin. at p. 608.

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that case have been a petition of right originating in parliament, but maintains that if it had been a petition of right, the King would have indorsed it, "Let right be done," and sent it to Chancery. As it was, he treats it as a petition of complaint, and as if the answer was no more than referring the petitioner to what Holt considered his common law remedy by monstrans de droit in the Exchequer. All this is disputed by Lord Somers. But it is to be observed that the difference between them was as to the question whether there was a remedy by petition to the barons of the Exchequer. The whole tenor of Holt's reasoning is, that in any case where there was a legal right against the Crown there must be a legal remedy, and one which could be made effectual. He expressly says that a petition of right was a remedy, but not the only remedy, as he maintained, where the grant was by letters patent under the great seal.

Certainly there is nothing to indicate that in Holt's opinion there was not, in the case of a Crown debt, even the imperfect remedy of a petition of right. Lord Somers' very elaborate argument is entirely directed to establishing that there was no power in the barons of the Exchequer to order the treasurer and chamberlains to make these payments; and as a step, and an important step, in his reasoning, he sets himself to prove that there was a remedy by petition of right which was, as he maintained, the only remedy. He denies Holt's position that monstrans de droit was at common law. And he says (1), "Indeed I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff to recover anything from the King, his only remedy at common law is to sue by petition to the person of the King. I say where the subject comes as a plaintiff. For, as I said before, when on a title found for the King by office, the subject comes in to traverse the King's title, or to shew his own right, he comes in in the nature of a defendant; and is admitted to interplead in the case with the King in defence of his title, which otherwise would be defeated by finding the office. And to shew that this was so, I would take notice of several instances. That in the case of debts owing by the Crown, the subjects' remedy was by petition appears by *Aynesham's Case* (2), which is a petition for 19*l.* due for work done at

(1) 14 How. St. Tr. at p. 84. (2) Ryley's Pl. Parl. 251.

Carnarvon." And he cites many other entries in parliament from Ryley.

Whether Lord Somers was right or not in thinking that the entries in Ryley are petitions of right, there can be no question that he here expresses a distinct and considered judgment that a petition of right would lie against the Crown for a simple contract debt, such as that for wages. And unless we overrule this judgment of his, which is not opposed to Holt's reasoning, and cannot therefore be considered as necessarily overruled by the House of Lords, we must in this case give judgment for the suppliant, and we do not find that this opinion of Lord Somers has been questioned since, but rather the contrary.

In Comyns' Digest, Prerogative, D. 78, it is said that petition lies if the King does not pay a debt, wages, &c.: citing Lord Somers' arg. 85; and Chief Baron Comyns expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth* v. *Haldeman* (1), that Lord Thurlow and Buller, J. (both obiter, it is true), expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the Barons of the Exchequer in *Oldham* v. *Lords of the Treasury* (2), and in *Baron de Bode's Case* (3), in which the point was raised, though not decided. Lord Denman declares "an unconquerable repugnance to the suggestion that the door ought to be closed against all redress and remedy," a doctrine much resembling what Lord Somers calls Lord Holt's "popular opinion," that if there be a right there must be a remedy. In *Viscount Canterbury* v. *Attorney General* (4), it was decided that the sovereign could not be sued by petition of right for negligence; and in *Tobin* v. *Reg.* (5), that the sovereign could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract, Erle, C.J., expressly saying (6) that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;" and in *Feather* v. *Reg.* (7), it is assumed in the judgment that it does lie "where the claim

(1) 1 T. R. at p. 178.
(2) 6 Sim. 220.
(3) 8 Q. B. 274.
(4) 1 Phill. 306.
(5) 16 Com. B. (N.S.) 310; 33 L. J. (C.P.) 199.
(6) 16 Com. B. (N.S.) at p. 355.
(7) 6 B. & S. 294; 35 L. J. (Q.B.) 200.

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arises out of a contract, as for goods supplied to the Crown on the public service."

We think, therefore, that we are bound by the *Banker's Case* (1) to hold that the judgment on this demurrer should be for the suppliant.

Judgment for the suppliant. (2)

Attorneys for suppliant: *Hollams, Son, & Coward.*
Attorney for the Crown: *Solicitor to the War Department.*

Nov. 25.

THOMAS *v.* THE QUEEN.

Petition of Right—Discovery of Documents—23 & 24 *Vict. c.* 34, *s.* 7—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 50.

In a petition of right there is no power to the suppliant to obtain a discovery of documents under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 50.

PETITION of right alleging an agreement between the suppliant and the secretary of state for war, by which it was agreed that the suppliant should be paid a certain sum for his invention as to the manufacture of heavy ordnance in the event of it being adopted by the government.

A rule was obtained by the suppliant calling upon the secretary at war, or his secretary, or the chief constructor of heavy rifle ordnance, or other proper officer of the War Department to shew cause why they should not answer on oath or affidavit, stating what documents they have in their possession or power, or under their control, relating to the matter in dispute, and all letters and all reports made by the inspector or other officers of the Board of Ordnance to the War Department relative to the same.

Holker, S.G. (with him *C. Bowen*), shewed cause. There would be no objection to produce the letters, but it would be contrary to public policy to produce the reports. However, there is the fatal objection to the rule, that the Petitions of Right Act (23 & 24 Vict. c. 34), s. 7, does not apply the proceedings under s. 50 of

(1) 14 How. St. Tr. 1. (2) See the next case.

the Common Law Procedure Act, 1854 (1), to a petition of right. *Tobin* v. *Reg.* (2) shews that there must be direct words to affect in any way the rights of the Crown. It is only in the case of a corporation that a person not a party to the action can be called upon to answer.

THE COURT then called upon

W. Williams, Q.C., in support of the rule. This action is really against the War Department.

[QUAIN, J. We do not know what the War Department means.]

It is clear that s. 7 was intended to extend to petitions of right all the statutes as to pleading, evidence, hearing, and trial, and the means of procuring and taking evidence. Discovery clearly comes within this.

[COCKBURN, C.J. If it had been intended to extend s. 50 of the Common Law Procedure Act, 1854, as to discovery of documents, to the case of petitions of right, there would have been

(1) By the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7: So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is presented shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this Act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 50: Upon the application of either party to any cause or civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made the court or judge may make such further order thereon as shall be just.

(2) 14 C. B. (N.S.) 505; 32 L. J. (C.P.) 216.

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inserted some enactment saying an officer should answer, as in the case of bodies corporate.]

PER CURIAM (Cockburn, C.J., Lush and Quain, JJ.):—

Rule discharged.

Attorneys for suppliant: *Hollams, Son, & Coward.*
Attorney for Crown: *Solicitor to War Department.*

Nov. 14.

THE QUEEN, ON THE PROSECUTION OF SARAH NUTT, RESPONDENT, *v.* HARVEY, APPELLANT.

Highway—5 & 6 *Wm.* 4, *c.* 50, *ss.* 84, 85—*Stopping up Highway as unnecessary*—*Certificate, Requisites of.*

A certificate given under the hands of two justices pursuant to 5 & 6 Wm. 4, c. 50, s. 85, is sufficient if it states the existence of the circumstances required by that section. It is unnecessary to state that the preliminaries enacted by s. 84 have been complied with.

AN appeal was tried at the general sessions for the county of Middlesex against a certificate under the hands of two justices relative to the stopping up of a public footpath or highway situate in the parish of St. Matthew, Bethnal Green.

At the trial of the appeal it appeared that the proofs and plans annexed to and referred to in the certificate had been duly lodged at the office of the clerk of the peace, and all the directions mentioned in s. 84 (1) of 5 & 6 Wm. 4, c. 50, had been complied with,

(1) By s. 84 of 5 & 6 Wm. 4, c. 50: Where the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up .... the chairman of such meeting shall by an order in writing direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view and the stopping up .... out of the money received by him for the purposes of this Act: provided that if any other person shall be desirous of stopping up .... any highway, he shall by notice in writing require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the surveyor shall apply to the justices as last aforesaid for the purposes aforesaid: and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby required to make such application as

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and that the application to stop up the highway was made by Sarah Nutt, who was the owner of land in the parish of St. Matthew, Bethnal Green. Service of the notice of appeal was admitted. On the certificate being read by the clerk of the peace, counsel for the appellant objected, pursuant to one of the grounds of appeal, "that the certificate was insufficient and bad on its face, by reason of its omitting to state that the surveyors, at whose request it was alleged the justices viewed the highway sought to be stopped up, had first duly obtained the consent of the inhabitants of the parish in vestry assembled to the proposed stopping up of the highway, after a notice in writing from the party desirous of stopping up the same, requiring the surveyors to convene a meeting of the vestry for the purpose of obtaining such consent; or that the surveyors were at the time of the request to view in possession of or acting under an order in writing of the chairman of a meeting of the inhabitants in vestry assembled."

The certificate stated that, an application having been made to the justices on behalf of the vestry of the parish of St. Matthew, Bethnal Green, who, by s. 96 of the Metropolitan Local Management Act (18 & 19 Vict. c. 120), were the surveyors of the highways of the parish, by the clerk to the vestry to view a certain highway or footway described in the certificate, the justices certified that they had viewed the highway or footway before described, and it appeared to them to be unnecessary. The certificate then stated in substance a compliance with the directions contained in 5 & 6 Wm. 4, c. 50, s. 85.

The sessions overruled the objection, and held the certificate to

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aforesaid. By s. 85: "When it shall appear upon such view of such two justices of the peace made at the request of the said surveyor as aforesaid, that any public highway .... is unnecessary, the justices shall direct the surveyor to affix a notice in the form or to the effect of Sched. No. 19 to this Act, ... at the place and by the side of each end of the said highway from whence the same is proposed .... to be stopped up .... also to insert the same notice in a newspaper, ... and the said notices having been so published and proof thereof having been given to the satisfaction of the justices, and a plan having been delivered to them at the same time, ... which plan shall be verified by some competent surveyor, the justices shall proceed to certify under their hands the fact of their having viewed the highway as aforesaid, ... and if the highway is proposed to be stopped up as unnecessary, why it is unnecessary ....

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be good, and confirmed the same, and dismissed the appeal subject to a case for the opinion of the Court of Queen's Bench.

Philbrick, Q.C., and *Poland*, for the respondent. It will be argued on the other side that the certificate ought to shew that the proceedings required to be taken under s. 84 have been taken, otherwise it does not shew that the justices have jurisdiction. Sect. 84 requires certain preliminary steps to be taken to put the surveyor in motion. The justices do not know of their own knowledge whether those steps have been taken, neither have they any authority to ascertain whether those preliminaries have been complied with. It cannot be intended that the justices should certify as to matters not within their own knowledge. Sect. 85 requires the justices, when called upon by the surveyor, to view the highway, and on proof that the notices have been affixed at the proper places, and certain other matters complied with, to certify that the highway is unnecessary. These are matters either within the knowledge of the justices or matters which they have power to inquire into. The certificate contains a statement that they have been called upon to act by the surveyors; there has been a compliance with the directions of s. 85; it is therefore sufficient. But assuming that the certificate ought to state that the preliminaries required by s. 84 have been complied with, the certificate in the present case shews such a compliance. By 18 & 19 Vict. c. 120, ss. 8, 96, and 19 & 20 Vict. c. 112, s. 3, the select vestry of Bethnal Green is constituted the vestry of such parish, and they are the surveyors of highways. The vestry, therefore, acts in a double capacity, and the statement in the certificate, that an application had been made "on behalf of the vestry of the parish of St. Matthew, Bethnal Green (who by s. 96 of 18 & 19 Vict. c. 120, are the surveyors of highways) by the clerk to the said vestry," involves the statement that the vestry had assembled and authorized the surveyor to make an application to the justices to view. There is a distinction between the case of a country parish and a metropolitan parish; in the former, the surveyor is the mere servant of the vestry, and can take no steps as to stopping up a highway without the sanction of the vestry; but in the case of a metropolitan parish the vestry are the surveyors, and upon the

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language of the present certificate it must be assumed that there has been a meeting of the vestry. St. Matthew, Bethnal Green, being a metropolitan parish, and there being a distinction between such a parish and a county parish, *Reg.* v. *Justices of Worcestershire* (1), which will be relied on on the other side, does not apply.

Edward Clarke and *Roscoe*, for the appellant. The certificate is defective. Sect. 84 contains two methods of proceeding where it is wished to stop up a highway; the one, when the application is made by the desire of the inhabitants of the parish; the other, when it is made at the instance of a private individual. Sect. 88 gives an appeal to any person who may think himself aggrieved; and s. 90 deals with the costs of the appeal: they are to be paid, as the case may require, either by the parish or by the party at whose instance the notice for stopping up the highway shall have been given. In the one case the party appealing is dealing with the vestry, and in the other case with a private individual. The certificate ought, therefore, to state at whose instance the highway is to be stopped up, in order that the appellant may know who is his opponent. As a further ground why the certificate ought to state whether the surveyor has been put in motion by a private individual, it is contended that the justices are bound to satisfy themselves that the surveyor is acting with authority, and it ought to be recorded that they have performed that duty. The matter, however, is concluded by authority. *Reg.* v. *Justices of Worcestershire* (1) is exactly in point. There the proceedings were instituted by a private person, and the objections to the certificate were precisely the same as in the present case. The sessions held that the certificate was defective. Coleridge, J., in delivering the judgment of the Court, said, "We had no doubt upon the argument that the decision of the Court upon this objection was correct." In *Rex* v. *Jones* (2) Coleridge, J., said, there is no part of the administration of the law by justices acting on their own authority in which it is more necessary for the Court to look closely at their proceedings than the stopping of highways. That case, and *Rex* v. *Downshire* (3), and *Rex* v. *Worcestershire* (4),

(1) 3 E. & B. 477; 23 L. J. (M. C.) 113.
(2) 12 A. & E. 684.
(3) 4 A. & E. 698, 721.
(4) 8 B. & C. 254.

(1) 8 C 18 Jan 24

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shew that great strictness is always required in the proceedings of justices in cases similar to the present.

BLACKBURN, J. In this case I am of opinion that the order of the sessions ought to be affirmed. I do not see any reason for making a distinction between a case where a metropolitan vestry are themselves surveyors of highways and the case where the vestry and the surveyor are different parties as in country parishes. I do not base my judgment on any such distinction, but on the ground that the certificate is valid if it state the requirements of s. 85 alone. Under that section the justices are to have proof brought before them to satisfy them that the several notices mentioned in the section have been given, and they are to view the spot, and then they are to certify under their hands the fact of their having viewed the highway, and if it be proposed to stop it up as unnecessary, the reason why it is unnecessary. The certificate, therefore, ought to state all that is required to be proved before the justices and all that the justices are required to do, which would be matters within their own knowledge. Now the justices acting on the requisition of the surveyor do not know, and cannot know, whether the meeting of the inhabitants in vestry, which the surveyor professes to have had assembled, was duly convened or not. They have no means of ascertaining whether it was or not, and would in every case have to rely on the statement of the surveyor, that he was acting with proper authority; if the meeting of the inhabitants in vestry was not duly convened the justices would have no means of knowing it. To state on the face of the certificate a fact which the justices do not know and could not inquire into would be of no use. By s. 88 an appeal to the sessions is given to persons who consider themselves aggrieved: I think it is then competent to the appellant, on that appeal, to object that the meeting of the vestry had not been properly convened, or that the surveyor had acted without authority. I have no doubt that such objections would be grounds of appeal, and if proved, the sessions would quash the certificate. But I do not think it necessary that the justices should state on the face of the certificate facts which are not within their knowledge, which are not required to be proved before them, and which

they have no power of inquiring into or taking evidence upon. In *Reg.* v. *Justices of Worcestershire* (1) the certificate did not state that the surveyors had obtained the consent of the inhabitants of the parish in vestry assembled to the proposed diverting of the highway, nor did it state that the surveyors were acting under an order in writing of the chairman of the vestry meeting. The Court of Quarter Sessions on appeal decided that the omission to state those facts made the certificate bad, and accordingly quashed it. Had they reserved a case for the Court of Queen's Bench, this Court would have had to consider whether the decision of the sessions was right, and had they so held, *Reg.* v. *Justices of Worcestershire* (1) would have been a case exactly in point. But the sessions did not state a case for the opinion of this Court. The person aggrieved applied to this Court for a mandamus commanding the sessions to hear and determine the appeal. The answer to that application was that the sessions had heard the appeal and quashed the certificate. The argument in support of the application was that the jurisdiction of the sessions was limited to the trying by a jury of the three questions stated in s. 89 of the Act, and therefore they had no jurisdiction to entertain the appeal on the ground that the certificate was defective; it was further argued that the Court would grant a mandamus to the justices to hear the appeal if they had decided what was manifestly wrong. To that Lord Campbell, C.J., said that he was of opinion that a mandamus could not lie to hear and determine where the justices had heard and determined the appeal, however erroneous their decision may have been. And Coleridge, J., in the course of the argument, said: "If the vestry had ordered the surveyor not to go on and he, notwithstanding, did go on, there must surely be some mode of stopping him." To which the counsel answered: "Probably, but not by appeal." In that remark I differ from the counsel. I am of opinion it would be a good ground of appeal. Then when the argument was completed Lord Campbell, C.J., says, and his remark clearly shews the question which was raised in *Reg.* v. *Worcestershire* (1): "It is impossible to contend that the objection is so clearly wrong and frivolous that we should say it could not be the subject of judicial

(1) 3 E. & B. 477; 23 L. J. (M. C.) 113. 18 Jur 424

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decision. The case, therefore, is reduced to the question, whether the sessions have jurisdiction to inquire into the validity of the certificate, or their appellate jurisdiction is limited; which is a question of difficulty and importance." Then, after consideration, an elaborate judgment is delivered by Coleridge, J. It is a satisfactory judgment, in which the Court decides that the sessions had jurisdiction to entertain the objections taken to the certificate, and that their appellate jurisdiction was not limited as contended for; and there is no doubt that the judgment, which was prepared by Coleridge, J., does contain this passage: "We had no doubt upon the argument that the decision of the Court upon this objection was correct." Now I can only say that the words of Lord Campbell, C.J., distinctly shew that he did then entertain doubt that the decision of the sessions was correct, but no doubt that it was not for this Court to consider and decide whether the decision of the sessions was correct or not. Although the words afterwards used by Coleridge, J., in the judgment of the Court delivered by him—not on the point which the Court reserved and took time to consider, but on a collateral point—shew that that judge entertained a different opinion, yet it is no decision of the Court. It is an authority which we must weigh with proper respect, but still not binding on us; and on duly considering the question, I think it is not necessary that the certificate should state on its face preliminary matters; that the vestry had duly held a meeting and duly authorized the surveyor to act, those being matters, as before stated, which the justices can neither know nor take evidence upon. However, I think the question is not one of any great importance, for if such an objection were taken on appeal at the sessions, and there was evidence before them that these preliminaries had been complied with, the sessions might amend the certificate according to the fact.

It has been argued that, this being a metropolitan parish, and the vestry and the surveyor being identical, it sufficiently appears on the face of the certificate that there has been a vestry meeting and the surveyor has been authorized to act on their behalf. I think, were it necessary that the certificate should state the preliminary matters, that it would be defective for not stating that the vestry were acting of their own accord, or were put in motion

by a private person. It is not, however, necessary to decide this point.

MELLOR, J. I am of the same opinion. The validity of the certificate may on appeal depend upon whether the vestry are rightly set in motion and they rightly set in motion the surveyor. But the question we have to decide is whether it is necessary for the justices to state in the certificate, that the surveyor was duly authorized to make the application to the justices, and that the meeting which was supposed to give authority to the surveyor was duly constituted. I agree that the justices have no means of judicially inquiring into these facts, and if they cannot be judicially inquired into they need not be stated in the certificate. I think, therefore, the sessions were right in the determination they arrived at in holding the certificate to be valid. With regard to *Reg.* v. *Justices of Worcestershire* (1) the real question was whether a mandamus to the justices would lie. The dictum of Coleridge, J., was not necessary for the determination of the question raised in the case, and with the greatest possible respect for that learned judge, I think we are at liberty to decide for ourselves whether the certificate is sufficient. I am of opinion that it is.

ARCHIBALD, J. I am also of opinion that the judgment of the quarter sessions, confirming the certificate, should be affirmed. The objection taken to it is that the preliminary facts necessary to give the justices jurisdiction do not appear sufficiently in it; and amongst those preliminaries it is said that, in proceedings to stop up a road, where the initiative is taken by a private person, the assent of the inhabitants assembled in vestry after notice in writing by the private person to the surveyor to summon a vestry, as well as the agreement of the vestry to the proposal, should be stated in the certificate. If it be necessary that those facts should appear on the face of the certificate, it is defective. I am rather inclined, though it is unnecessary to decide the point, to think that the statement in the certificate that the application is made on behalf of such a vestry as this, they being themselves surveyors to the parish, might be sufficient; still,

(1) 3 E. & B. 477; 23 L. J. (M. C.) 113.

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assuming the proposal was by a private person, the fact is omitted that the application was made on behalf of a private person. But looking at s. 84 altogether apart from *Reg.* v. *Justices of Worcestershire* (1), I think it is unnecessary for these facts to appear in the certificate. It appears to me that the jurisdiction of the justices is founded on the application of the surveyor. There is a difference in the language employed in ss. 84 and 85. The latter requires that certain facts shall be proved before the justices, and therefore they may certify as to matters established before them; s. 84 does not require proof of the matters therein mentioned to be given to the justices; and this omission in s. 84 satisfies me that the statement in the certificate of the matters in that section is not considered essential to shew jurisdiction.

Then comes the question how far the Court is bound by the decision in *Reg.* v. *Justices of Worcestershire.* (1) On that point I agree with my Brother Blackburn. No doubt the dictum of Coleridge, J., is entitled to great respect, but, not being necessary to the decision of the case, is not binding on us.

Order of sessions affirmed.

Attorneys for respondent: *Walker & Battiscombe.*
Attorneys for appellant: *Horne & Hunter.*

Dec. 10.

FALVEY *v.* STANFORD.

New Trial—Inadequacy of Damages—Compromise amongst Jury—Slander.

A new trial will be granted for inadequacy of damages in an action for slander where the smallness of the amount shews that the jury have made a compromise, and, instead of deciding the issues submitted to them, have agreed to find for the plaintiff for nominal damages only.

DECLARATION that the defendant falsely and maliciously spoke and published of the plaintiff the words following, "He has been convicted of perjury and fined 100*l.*"

Plea, not guilty. Issue thereon.

At the trial before Archibald, J., at the sittings in Middlesex

(1) 3 E. & B. 477; 23 L. J. (M. C.) 113.

after Hilary Term, 1874, the jury found a verdict for the plaintiff, with one farthing damages.

A rule was afterwards obtained for a new trial, on the ground of inadequacy of damages, and that the verdict was no verdict, but a compromise.

Nov. 11. *Lopes, Q.C.*, and *Castle*, shewed cause. The rule of practice is well established, and is thus stated in Chitty's Archbold, at p. 1456, 10th ed.:—"In actions of libel and slander the Courts never grant a new trial merely upon the ground of the damages being too small, and this though the judge is not satisfied with the verdict." This statement of the law is in accordance with the decision of the Court of Common Pleas in *Rendall* v. *Hayward*. (1) New trials are sometimes granted for inadequacy of damages in actions for bodily injury, but this Court, in *Armytage* v. *Haley* (2), pointed out that the granting of a new trial because the damages were too small is not allowed in actions for slander. In the present case the question was for the jury, and no special circumstances are shewn to induce the Court to grant a new trial.

Digby Seymour, Q.C., and *Pellew*, in support of the rule. No doubt the general rule is not to grant a new trial in actions for slander for inadequacy of damages: but where the plaintiff brings an action to vindicate his character, and the jury, by finding for him, disbelieve the slander, and yet return a verdict for a nominal sum, the verdict is really no verdict, but merely a compromise of conflicting views. Willes, J., in *Forsdike* v. *Stone* (3), intimates that a new trial may be granted in an action for slander for inadequacy of damages, where the jury have misconducted themselves, or made a mistake, or where their verdict appears to have been the result of a compromise.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Quain and Archibald, JJ.) was delivered by

QUAIN, J. This was an action for slander, in which the jury found a verdict for the plaintiff, with one farthing damages.

(1) 5 Bing. N. C. 424. (2) 4 Q. B. 917.
(3) Law Rep. 3 C. P. at p. 611.

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A rule was obtained by the plaintiff to set aside this verdict, on the ground of inadequacy of damages, and that the verdict was no verdict, but a compromise. It was contended on behalf of the defendant, in shewing cause against the rule for a new trial, that in actions for slander it is not the practice to grant a new trial on the ground of inadequacy of damages, unless there has been some mistake in point of law on the part of the presiding judge, or in the calculation of figures by the jury. In support of this contention, reference was made to the case of *Rendall* v. *Hayward* (1), and if the circumstances were such as to leave no doubt that the jury had fairly exercised a judgment upon the issue before them, and upon the amount of compensation due in the shape of damages, the practice contended for (in the absence of other considerations restricting its application), would, in the exercise of the discretion of the Court be generally followed. But the principles by which we think the Court should be governed in granting or refusing a new trial in actions of tort on the ground of insufficiency of damages, are not fully explained in the case referred to, but are, as we conceive, correctly stated by Blackburn, J., in his judgment in the case of *Kelly* v. *Sherlock* (2), viz. that there is no inexorable rule of practice precluding the granting of a new trial on account of the smallness of the damages, but where the smallness of damages shews that the jury have made a compromise, and instead of deciding the issue submitted to them of guilty or not guilty, have agreed to find for the plaintiff for nominal damages only, a new trial will be granted, such a case being in effect as if the jury had been discharged without a verdict. In the present case the words complained of were grossly slanderous, and calculated, if believed, to be extremely injurious to the character of the plaintiff. On the other hand, although there was no proof of any actual damage sustained by the plaintiff, yet there was no evidence whatever that he had done anything to provoke or give the least ground for the slanderous imputation cast upon him, or to shew that he had disentitled himself in any way to claim such a verdict as would be practically sufficient to vindicate his character. Under these circumstances, a finding that the slander was uttered, but that a farthing was

(1) 5 Bing. N. C. 424. (2) Law Rep. 1 Q. B. at p. 697.

sufficient by way of compensation, seems so utterly inconsistent, as to leave little doubt that the question was not duly considered by the jury, and that the verdict was the result of an unwillingness either to find for the plaintiff upon the issue of not guilty, with the natural and logical consequences of such a finding, or to find for the defendant; and that it was a species of compromise, and, in fact, no true verdict at all. This was the impression produced at the time upon the mind of the learned judge before whom the case was tried, who, it must be added, was not satisfied with the verdict. We are of opinion, therefore, that the case ought to be submitted to the consideration of another jury, and that the rule for a new trial should be made absolute.

Rule absolute.

Attorney for plaintiff: *Joel Emanuel.*

Attorneys for defendant: *Venning, Robins, & Co.*

CURTIS AND OTHERS *v.* WILLIAMSON AND OTHERS.

Dec. 10.

Principal and Agent—Proof by Creditor upon Estate of Insolvent Agent—Election to treat Agent as Debtor after undisclosed Principal discovered.

The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor.

B. purchased certain goods of the plaintiffs: he was the agent of the defendants, his undisclosed principals. B. became insolvent, and the plaintiffs then became aware that the defendants were principals. With this knowledge the plaintiffs' clerk sent an affidavit of proof of the debt due to them against the estate of B., whose affairs were being liquidated by arrangement. The plaintiffs endeavoured to prevent the affidavit of proof from being filed, but were unsuccessful:—

Held, that the mere filing of the affidavit of proof formed no obstacle to the plaintiffs suing the defendants for the price of the goods sold to B.

DECLARATION for goods bargained and sold and sold and delivered, and for interest and money due on accounts stated.

Plea never indebted. Issue thereon.

At the trial before Quain, J., at the Winter Assizes at Liverpool, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit.

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A rule was accordingly obtained on the ground that the plaintiffs had not elected to go against the defendants, but had elected to proceed against Boulton, the agent.

The facts and arguments sufficiently appear in the judgment of the Court.

Nov. 11. *C. Russell, Q.C.*, and *Potter*, shewed cause.

C. Crompton and *Gorst*, in support of rule.

The following authorities were cited: *Priestly* v. *Fernie* (1); *Smethurst* v. *Mitchell* (2); *Calder* v. *Dobell* (3); *Morgan* v. *Couchman* (4); *Bottomley* v. *Nuttall.* (5)

Cur. adv. vult.

Dec. 10. The judgment of the Court (Cockburn, C.J., Quain, and Archibald, JJ.) was delivered by

QUAIN, J. This was an action to recover the price of gunpowder bought of the plaintiffs by one Boulton in his own name, but in reality as agent for the defendants, and for the purpose of being used in a mine which was their property. The fact of the agency was not disclosed at the time of the purchase, but it afterwards became known to the plaintiffs that the defendants were the principals.

After the plaintiffs had acquired this information, Boulton having filed a petition for the liquidation of his estate, an affidavit in the usual form, for the purpose of proving under the liquidation for the price of the powder, was made by a clerk of the plaintiffs, treating Boulton as their debtor, and was sent by post to Birmingham, to be filed in the county court there, in which the proceedings in liquidation were carried on.

Almost immediately after this affidavit had been posted the plaintiffs' attorneys, being apprehensive that a claim against Boulton's estate might prejudice their rights as against the defendants, despatched a telegram to their agent at Birmingham, directing him not to file the affidavit. The telegram, however,

(1) 3 H. & C. 977; 34 L. J. (Ex.) 172.

(2) 1 E. & E. 622; 28 L. J. (Q.B.) 241.

(3) Law Rep. 6 C. P. 486.

(4) 14 C. B. 100; 23 L. J. (C.P.) 36.

(5) 5 C. B. (N.S.) 122; 28 L. J. (C.P.) 110.

was too late, and was not received until after the affidavit had been filed; but no further step of any kind was taken by the plaintiffs in relation to the liquidation proceedings, nor has any dividend been received by them. Shortly after the affidavit had been thus filed this action was commenced against the defendants. There was no evidence whatever that after the fact of the agency had become known to the plaintiffs the state of the accounts between the defendants and Boulton had been in any way altered to the prejudice of the defendants; and the sole question raised by the rule, which was granted to set aside the verdict for the plaintiffs and enter a nonsuit, is, whether, under the circumstances, the making and filing of the affidavit in bankruptcy amounted, in point of law, to a conclusive election by the plaintiffs to treat Boulton as their debtor, so as to preclude them from maintaining this action against his principals. We are of opinion that it did not. There can be no doubt that, in the absence of any alteration of the account to the prejudice of the principals, the plaintiffs, on discovering that Boulton was merely an agent for the defendants, had a right within a reasonable time (*Smethurst* v. *Mitchell* (1)) to elect to proceed against the defendants: *Thompson* v. *Davenport* (2); unless in the meantime, with full knowledge as to who were the principals, and with the power of choosing between them and the agent (*Addison* v. *Gandasequi* (3) and *Paterson* v. *Gandasequi* (4)), they had distinctly and unquestionably elected to treat the agent alone as their debtor. Principals and agent were equally liable upon the contract, and the vendor had a clear option as to which of them he would hold responsible. The question is, What is sufficient to constitute a binding election in point of law? In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of *Calder* v. *Dobell* (5); but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards

(1) 1 E. & E. 622; 28 L. J. (Q.B.) 241.
(2) 9 B. & C. 78, 86.
(3) 4 Taunt. 574.
(4) 15 East, 62.
(5) Law Rep. 6 C. P. 486.

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resorting to the principal. Whether in regard to proceedings taken against the agent by action at law anything short of judgment and satisfaction would be sufficient to exclude resort to the principal, was the point raised in the case of *Priestly* v. *Fernie* (1), which was cited on behalf of the defendants. There an action had been brought in the Supreme Court of Melbourne against the captain of a ship for the non-delivery of goods pursuant to a bill of lading, in which the plaintiff recovered judgment. A fresh action was afterwards brought upon that judgment in the Court of Exchequer at Westminster, and upon the judgment which was then recovered against the defendant (the captain), a ca. sa. was issued, upon which the captain was arrested and detained until he was subsequently made a bankrupt, and was discharged under the Bankruptcy Acts. An action was then brought by the same plaintiff for the same breach upon the bill of lading against the shipowner (the principal), to which was set up, by way of defence, the previous proceedings against the captain, which were relied on as a conclusive election in point of law to hold the captain alone responsible and discharge the shipowner. It was argued, on behalf of the plaintiff in that case, that generally resort might be had to the principal unless the agent had been so dealt with as to render such a course unjust, and that so far as legal proceedings against the agent were concerned, nothing short of satisfaction as well as recovery of judgment would have that effect, and it was pointed out that the discharge of the captain by force of the bankrupt law, and without the plaintiff's consent, did not amount to satisfaction. The Court, however, there held that where an agent who has made a contract in his own name has been sued on it to judgment, even without satisfaction, no second action would be maintainable against the principal; but it is clear, from the language used by Bramwell, B., in delivering the judgment of the Court, that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word "sue" he means "sue to judgment." If the facts in the present case were similar to those in *Priestly* v. *Fernie* (1), we should, of course, be

(1) 3 H. & C. 977; 34 L. J. (Ex.) 172.

bound by the decision in that case to hold that "suing" the principal in the sense in which the word "sue" is there used, would, though the claim remained unsatisfied, amount to a binding election; but the proceedings in question have little analogy, and fall very far short of what occurred in *Priestly* v. *Fernie*. (1) There two successive actions had been brought against the captain, one abroad and the other in this country, without any intermediate attempt, so far as appears, to hold the shipowner liable, and the agent (the captain) had been actually taken in execution. Here, however, no action was ever commenced against the agent, and every effort was made to intercept and withhold the affidavit in bankruptcy which had been made, as it would seem, without due consideration and without any intention whatever to discharge the present defendants from responsibility. We think it would be going much too far to hold that this was in point of law a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals. It might possibly, in an appropriate case, constitute with other facts some evidence of election to be submitted to a jury; but we cannot regard it in itself as a legal bar to proceedings against the defendants; nor is there any question that, if at liberty to sue the principal at all, the action was brought within a reasonable time. For these reasons we are of opinion that the rule to set aside the verdict and enter a nonsuit should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Wynne, Barrell, & Rodway, Liverpool.*
Attorney for defendants: *Compton Smith, Burslem.*

(1) 3 H. & C. 977; 34 L. J. (Ex.) 172.

1874 HOWELLS AND OTHERS *v.* THE LANDORE SIEMENS STEEL COMPANY,
Nov. 4. LIMITED.

Master and Servant—Liability of Master for Injury caused by Fellow-servant—Manager appointed under Coal Mines Regulations Act, 1872 (35 & 36 *Vict.* c. 76).

The defendants were the owners of a colliery within the Coal Mines Regulations Act, 1872 (35 & 36 Vict. c. 76), and they had appointed a certificated manager as required by s. 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager:—

Held, that the fact that the manager was appointed pursuant to the Act did not put him in any different position from that he would have held had he been simply appointed manager; and that he was a fellow-servant with the deceased; and the defendants were, therefore, not liable to the representatives of the deceased for his death.

DECLARATION by the representatives of John Howells, deceased, to recover damages for his death alleged to have been caused by the defendants' negligence.

Plea: not guilty. Issue joined.

At the trial before Quain, J., at the last Glamorganshire Summer Assizes, it appeared that the defendants are the "owners" of the Worcester Colliery, within the meaning of the Coal Mines Regulations Act, 1872 (35 & 36 Vict. c. 76), s. 72; and they had appointed one B. Thomas a certificated manager of the coal mine as required by s. 26. (1) The deceased was a miner working in the colliery and was killed when in the mine by an explosion of fire-damp; and the death was owing, as the jury found, to the negligence of Thomas, the manager, in disregarding the observance of rule 6 in s. 51 (2), and not withdrawing the workmen after noxious gas had been found to prevail in the mine.

(1) 35 & 36 Vict. c. 76, s. 26: "Every mine to which this Act applies shall be under the control and daily supervision of a manager, and the owner or agent of every such mine shall nominate himself, or some other person (not being a contractor for getting the mineral in such mine, or a person in the employ of such contractor), to be the manager of such mine, and shall send written notice to the inspector of the district of the name and address of such manager.

"A person shall not be qualified to be a manager of a mine to which this Act applies, unless he is for the time being registered as the holder of a certificate under this Act." And a penalty is imposed for working a mine without a certificated manager.

(2) 35 & 36 Vict. c. 76: By s. 51: "The following general rules shall be

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The learned judge was of opinion that the manager must be taken to be a fellow-servant within the decision of the House of Lords in *Wilson* v. *Merry* (1), and directed a verdict for the defendants, with leave to move to enter it for the plaintiffs for 150*l.*, if the Court should be of opinion that the fact that the negligence was that of the certificated manager appointed under the Act made any difference.

Field, Q.C. (with him *J. W. Bowen, Q.C.*, and *B. T. Williams*), moved accordingly. It must be conceded that since the case of *Wilson* v. *Merry* (1) the doctrine, assumed in *Murphy* v. *Smith* (2), as to the liability of the master for the acts of a person whom he leaves, as it were, as his vice-principal in the management of the concern, is exploded. And the doctrine of *Feltham* v. *England* (3) and other cases as to the non-liability of the master to a servant for the negligence of a fellow servant must prevail, unless there is anything in the peculiar facts to take the case out of the general rule. First, the defendants here are a corporation, and they can only act by their manager.

[BLACKBURN, J. That cannot make any difference; in *Morgan* v. *Vale of Neath Ry. Co.* (4) the defendants were a corporation, and nobody thought of suggesting any distinction on that ground.]

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observed, so far as is reasonably practicable, in every mine to which this Act applies:

"(6.) If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of noxious gases prevailing in such mine, or such part thereof, or of any cause whatever, the mine, or the said part, is dangerous, every workman shall be withdrawn from the mine, or such part thereof as is so found dangerous, and a competent person, who shall be appointed for the purpose, shall inspect the mine, or such part thereof as is so found dangerous, and if the danger arises from inflammable gas shall inspect the same with a locked safety-lamp, and in every case shall make a true report of the condition of such mine, or part thereof, and workmen shall not, except in so far as is necessary for inquiring into the cause of danger, or for the removal thereof, or for exploration, be readmitted into the mine, or so much thereof as was found dangerous, until the same is stated by such report not to be dangerous . . . ."

Sect. 60 imposes a penalty of 20*l.* on owner, agent, or manager, if guilty of any offence against the Act, and 2*l.* on any other person so guilty.

(1) Law Rep. 1 H. L. Sc. 326.

(2) 19 C. B. (N.S.) 361.

(3) Law Rep. 2 Q. B. 33.

(4) Law Rep. 1 Q. B. 149.

5 B. L. 736

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Secondly, by s. 26 of the Coal Mines Regulations Act, 1872 (35 & 36 Vict. c. 76), the owner of a coal mine is obliged to appoint a certificated manager; consequently the manager in the present case, whose negligence must be taken to have caused the death, was in a different position from an ordinary manager.

[BLACKBURN, J. Under the Merchant Shipping Act (1) the captain of a ship must be certificated, but it was never suggested that that made any difference in the position of the captain as servant to the shipowner.]

Throughout the Act (see ss. 13, 17, 18, 20, 60), the owner, agent, or manager are treated as convertible terms, the duty of each is the same.

[BLACKBURN, J. If the manager is the agent only and not the servant of the mine-owner, then the defendants would not be liable for his negligence.]

It was the breach of rule 6 in s. 51 which caused the death.

[BLACKBURN, J. That rule is to be observed by the person for the time being in charge of the mine.]

COCKBURN, C.J. Since the case of *Wilson* v. *Merry* (2) in the House of Lords it is not open to dispute that in general the master is not liable to a servant for the negligence of a fellow-servant, although he be the manager of the concern; and the only question is, whether the Act of Parliament puts a certificated manager of a mine appointed under the Act in such a position as to distinguish him from the person for whose negligence the master was held not liable to a fellow-servant in *Wilson* v. *Merry*. (2) I cannot say that Thomas was here anything more than a vice-principal, or manager, and he was therefore a fellow-servant. If he had been appointed irrespectively of the Act he would have had precisely the same authority, neither more nor less; and it therefore makes no difference that, instead of being appointed by the defendants proprio motu, he is appointed pursuant to the requirements of the statute.

BLACKBURN, J. I am of the same opinion. It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is

(1) See 17 & 18 Vict. c. 104. s. 136. (2) Law Rep. 1 H. L. Sc. 326.

employed; but there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is held not so responsible: because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment. When the master personally interferes, he is liable for his personal negligence, just as the individual servant would be. In the present case Thomas was appointed manager pursuant to the Act; can that make any difference? It is essential for the plaintiffs' case to make out that Thomas was a servant of the defendants, and I think he was; and I cannot see anything in s. 26 to make him, though a servant, yet not a fellow-servant. There have been several cases in which, whether vice-principal or manager, the person has been held a fellow-servant. In Scotland it seems that a vice-principal had been held to be in a different position from an ordinary fellow-servant. But the decision of the House of Lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant.

QUAIN, J. I am of the same opinion. I thought at the trial that the case of *Wilson* v. *Merry* (1) governed the case, and that the statute made no difference; and I remain of the same opinion now.

ARCHIBALD, J., concurred.

Rule refused.

Attorney for plaintiffs: *Woodward, Swansea.*

(1) Law Rep. 1 H. L. Sc. 326.

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LEMAN *v.* HOUSELEY.

Medical Act, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32—*Apothecaries Act* (55 *Geo.* 3, *c.* 194), *s.* 21—*Right of Practitioner registered as Apothecary after Services rendered and before Action.*

Under the Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31, 32, and the Apothecaries Act (55 Geo. 3, c. 194), s. 21, in order to recover for medicines and attendance as an apothecary it is necessary that the practitioner should have been qualified and registered at the time of the services rendered; and it is not sufficient that he produce at the trial a certificate of registration obtained after action brought.

Turner v. *Reynall* (14 C. B. (N.S.) 328; 32 L. J. (C.P.) 164), and *Haffield* v. *Mackenzie* (10 Ir. C. L. Rep. 289), discussed.

CASE on appeal from the County Court of Derbyshire holden at Alfreton.

Action by the plaintiff to recover 8*l.* 3*s.* 6*d.* for medicine supplied to, and medical attendances made upon, the defendant by one Arthur Matthews, of whose estate the plaintiff is trustee in liquidation.

Matthews is a surgeon, and on the 22nd of October, 1872, was registered under the Medical Act (21 & 22 Vict. c. 90), as a member of the Royal College of Surgeons, and had no other qualification within the meaning of the Act.

Prior to the 22nd of October, 1872, the plaintiff had issued about 100 plaints against different parties (among others against the present defendant), for sums alleged to be due from them to Matthews for surgical and medical attendances respectively, and the plaints were returnable and were on the judge's list for hearing on the 22nd of October, 1872.

The first case called on was the case of the plaintiff against Hiram Fletcher. In that case it appeared from the evidence that some of the items in the bill against the defendant Fletcher were for medicines administered in the cure of an internal disease not requiring surgical treatment, and for advice and attendance connected therewith, and that other items were for medicines administered for the purpose of removing a complaint which it is within the province of a surgeon to attend to and cure.

Objection was taken that for want of due qualification on the

part of Matthews, the plaintiff was not entitled to recover, and the judge granted a case, which was argued and decided in this court on the 2nd of May, 1873, when the Court held that, as Matthews was registered as a surgeon only, the plaintiff was entitled to recover in respect of Matthews' surgical cases and the medicines applicable thereto only, but not in respect of the medical cases and the medicines applicable thereto. (1)

On the 22nd of October, 1872, all the other cases stood generally adjourned.

Subsequently to the 22nd of October, and subsequently to the judgment of this Court in *Leman* v. *Fletcher* (1), Matthews was examined for, and on the 25th of October, 1873, obtained his diploma as an apothecary, and has been placed, and was on the 20th of January, 1874, on the medical register as a medical and surgical practitioner.

After this registration an application was made to the judge of the county court to appoint a day for hearing the adjourned cases, and the judge fixed the 20th of January, 1874. On that day, upon the first case being called on, namely, the case against the now defendant, it was admitted that part of the items in the plaintiff's particulars were for medicines administered in the cure of an internal disease not requiring surgical treatment, and for advice and attendance connected therewith, and that other items were of a surgical nature.

It was contended that a judgment in accordance with the decision in *Leman* v. *Fletcher* (1) ought to be entered in the defendant's case, on the grounds, first, that it was necessary that Matthews should hold the necessary qualifications and be registered in respect thereof at the time the services in question were rendered; and, secondly and principally, on the ground that the 22nd of October, 1872, the day when the summonses were returnable and were on the judge's list for hearing, although not actually heard, was the day of trial or hearing within the meaning of s. 32 of the Medical Act of 1858 (21 & 22 Vict. c. 90). (2)

(1) Law Rep. 8 Q. B. 319.

(2) 21 & 22 Vict. c. 90, s. 31: "Every person registered under this Act shall be entitled according to his qualification or qualifications to practise medicine or surgery or medicine and surgery, as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any court of law, with full costs of suit,

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The learned judge decided against this contention, and held, as against the defendant, that, inasmuch as then, on the 22nd of January, 1874, Matthews was on the register as both a medical and surgical practitioner, the plaintiff was entitled to recover generally in respect of the whole of his claim, both for medical and surgical attendances and medicines respectively; and he gave judgment accordingly, but gave the defendant leave to appeal.

The question for the opinion of the Court is whether, under the circumstances and upon the grounds above set forth, the defendant is entitled to have a judgment entered against him similar to that in the case of *Leman* v. *Fletcher*. (1)

If the Court should be of opinion in favour of the defendant, judgment was to be entered for the plaintiff for 1*l*. 5*s*., but the plaintiff to pay the costs of this appeal; if in favour of the plaintiff, then judgment to be entered for him for 8*l*. 3*s*. 6*d*., and the defendant to pay the costs of this appeal.

Patchett, for the defendant. *Leman* v. *Fletcher* (1) decided that a practitioner could not recover for medicines supplied as an apothecary if he were registered as a surgeon only. By the joint effect of the Apothecaries Act (55 Geo. 3, c. 194), s. 21, and 21 & 22 Vict. c. 90, ss. 31, 32, inasmuch as practising and the recovery of fees by an unregistered apothecary are forbidden, it follows that qualification and registration after the services have been rendered are of no avail.

THE COURT then called upon

Cave, for the plaintiff. It has been held upon the construction of 21 & 22 Vict. c. 90, ss. 31, 32, by the Court of Common Pleas, in *Turner* v. *Reynall* (2), that it is sufficient if the practitioner be registered before the day of trial.

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reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients: . . .

Sect. 32: "After the 1st day of January, 1859, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

(1) Law Rep. 8 Q. B. 319.

(2) 14 C. B. (N.S.) 328; 32 L. J. (C.P.) 164.

[BLACKBURN, J. It is the qualification and not the registration which gives the right to sue. The enactment of the Apothecaries Act (1) does not seem to have been brought to the notice of the Court.]

The Court of Common Pleas were clear on the matter; and moreover there is the decision of the Irish Court of Exchequer to the same effect in *Haffield* v. *Mackenzie*. (2)

[BLACKBURN, J. The Apothecaries Act has no operation in Ireland.]

That case proceeded, no doubt, on the broad ground that there was nothing in the Act of 1858 to prohibit the practising of an unregistered practitioner. (3)

BLACKBURN, J. There must be judgment for the defendant. The old Apothecaries Act, by ss. 20 and 21, forbade an unregistered apothecary from practising or recovering his fees. The new Act leaves that untouched. And the intention of the Act was clearly to prevent unqualified persons from practising, and it required a new register to be kept. In order to carry this intention out it is obvious that the qualification and registration ought to exist at the time the services are rendered, and not merely at the time of trial.

(1) By 55 Geo. 3, c. 194, s. 20, a person is prohibited from practising as an apothecary without having obtained a certificate under a penalty of 20*l*. Sect. 21: "No apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial . . . that he has obtained a certificate to practise as an apothecary from the said Master, Wardens, and Society of Apothecaries as aforesaid."

(2) 10 Ir. C. L. Rep. 289.

(3) In *Turner* v. *Reynall*, which was an action for medicines, &c., supplied as an *apothecary* by two partners, Turner, the one partner, had been all along registered as a surgeon and apothecary, but Smith, the other partner, had only been registered as a surgeon the day before the trial, *and was not registered as an apothecary at all.*

Haffield v. *Mackenzie* was an action by a person registered as a *surgeon* after the services were rendered; and the argument for the plaintiff was based on the ground that at the passing of 21 & 22 Vict. c. 90 he had a vested right at common law to recover for his professional services. And the Court in their judgment observe (10 Ir. C. L. Rep. at p. 294) that it is admitted that there is no provision in 21 & 22 Vict. c. 90 which in terms prohibits an unregistered surgeon from practising, or from recovering fees for professional services rendered before registry.

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QUAIN, J. I am of the same opinion. If the view taken by the late Chief Justice of the Common Pleas were carried out the essence and object of the Act would be defeated, which were the protection of the public against unqualified practitioners.

ARCHIBALD, J. I am of the same opinion. The intention of the Act was to enable the public to distinguish between qualified and unqualified practitioners; but if it were sufficient merely to produce a certificate at the trial, although granted after action brought, a person however ignorant at the time of the services rendered, might subsequently become qualified, and maintain an action in the same way as the best qualified practitioner.

Judgment for the plaintiff for 1*l.* 5*s.*

Attorneys for plaintiff: *Eyre & Co., for Thurman, Alfreton and Ilkston.*

Attorneys for defendant: *Stevens & Co., for Cutts, Chesterfield.*

Nov. 20.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* BUCKMASTER AND OTHERS.

Poor-rate—Exclusive Occupation—Licence or Demise—Replevin.

10 C.B. 509
5 H. & N. 4
1 C.P.D. 55
2 App. Cas. 167
9 Q.B.D. 595
10 Q.B.D. 218
33 L.T.

The plaintiffs, a railway company, were the owners of some stables situate within the gates shutting in their station premises from the public roads. By the permission of the plaintiffs, the stables were used by coal-owners under agreements, by which the coal-owners, "in consideration of the railway company permitting us to occupy and use a stable for four horses, do hereby agree to pay the monthly rent or sum of 1*l.* 5*s.*; and so long as we shall occupy and use the stables we agree to observe and be bound by the bye-laws which shall for the time being be issued by the company for the government of their railway stations, premises, and conveniences; and we undertake to deliver up possession of the stable at the expiration of one month after a notice in writing from the agent of the company, to be given at any time." The plaintiffs had not in fact exercised any control over or used any of the stables during the currency of the agreements; and none of the bye-laws had any application to the stables. The plaintiffs having been rated to the poor-rate in respect of the stables:—

Held, that the plaintiffs were rightly rated as occupiers; for that, on the true construction of the agreement, looking at the situation of the stables, it was

the intention of the plaintiffs to retain control over the stables, and not to part with the exclusive occupation to the coal-owners.

Semble, that, where one assessment is made in respect of property of which part is occupied and part is not occupied by the person rated, the question can be raised in replevin.

Affirmed in Ex Ch post 444

CASE stated by consent in an action of replevin.

The following is all that it is material to set out:—

The plaintiffs, the London and North Western Railway Company, under their several Acts of Parliament, have become the owners of certain lands near Clapham Junction Station, in the parish of St. Mary, Battersea.

The defendants acted in the distress, the subject of the replevin, as churchwardens and overseers of the parish. The distress warrant was in the usual form, and the levy must be taken to have been made for the aggregate of the amounts of the rates therein mentioned.

In the rate made the 28th of May, 1870, the plaintiffs were inserted as owners and rated as occupiers of "twelve lines of rails, nine turntables, stable, and cottage," the whole being rated together at 250*l.* gross rental, 200*l.* rateable value, the aggregate of the several rates being 29*l.* 3*s.* 4*d.*

There are twelve lines of rails, the property of the London and North Western Railway Company, which are the lines referred to in the rate, and the nine turntables and the sites thereof are owned by the plaintiffs.

The strips of land at the sides of these rails are also owned by the plaintiffs and used for the purposes and in the manner hereinafter described.

The stables mentioned in the rate are the property of the plaintiffs, and by their permission used by coal-owners under agreements identical in form with the following:—

"We, the Clay Cross Company, in consideration of the London and North Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the Clapham Station of the said company, do hereby undertake and agree that we will pay the said railway company the clear monthly rent or sum of 1*l.* 5*s.*, without any deduction whatsoever (property tax only excepted), the first payment to be made on the

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first day of March next. And we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the said railway company for the government and use of their railway stations, premises, and conveniences. And we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose, signed by any agent of the said railway company, to be given at any time, shall be served on us, our executors or administrators, either personally or by being affixed to any conspicuous part of the aforesaid stable, provided that in such case a proportionate part only of the rent for the then current month hereby reserved shall be paid to the said railway company."

The company (the plaintiffs) have not in point of fact exercised any control over or used any of the stables during the currency of these agreements. And none of the bye-laws, rules, and regulations mentioned in the above agreement are material to this case.

The offices are also the property of the plaintiffs, and are and were at the time at which the rate was made, used by different coal-owners by the permission of the plaintiffs under agreements.

These coal-owners, and not the plaintiffs, are rated in respect of the occupation of these offices. There is a bank and fence between these offices and the rest of the property of the plaintiffs, and the doors of the offices open on to a public road called Falcon Lane.

Access to the rest of the property, including the stables, is obtained by a gateway at the point at which the plaintiffs' approach road joins Falcon Lane; and there is another gate, giving access to another public road called Lavender Hill, from the approach road at the other end of the plaintiffs' premises.

The cottage mentioned in the rate is situate at the point where the approach road falls into Lavender Hill. This is inhabited by one of the company's servants, and it is admitted that the company are rateable for this.

The twelve lines of rails and sidings, or pitched spaces or strips (except the three lines immediately adjacent to the West London Extension Railway, which are partly used by the company for their own traffic), were and are (except that the plaintiffs used

them when not occupied by the coal-owners, &c.) used exclusively for the reception of trucks and the storage of coal, stone, &c., belonging, not to the plaintiffs, but to various coal-owners and merchants, and to a stone merchant. In these trucks are brought coals from collieries connected with the plaintiffs' system of railways over such railways and the main line of the West London Extension Railway, with which line the said twelve lines of railway are connected by a junction to the west.

The space appropriated to one coal-owner, when not fully occupied by him, is appropriated by the servants of the plaintiffs to other coal-owners.

There is no junction to the east, but the siding is terminated by stop buffers. In others of the trucks stone is brought for the stone merchant in a similar manner.

After the coals were stacked on the pitched spaces allotted to the coal-owners or merchants to whom the coals respectively belonged, they remained there until they were sold, or until the owners of them thought fit to remove them. The carts, &c., by which they were removed entered by the approach road. A machine for weighing and an office for the weigher, who was in the plaintiffs' employ, stood half-way down the approach road.

No payment other than the office-rent and the haulage rates or tolls were paid to the plaintiffs by the coal-owners or merchants, or by the stone merchant, who enjoyed the use of the pitched spaces and lines of rails as hereinbefore described.

The plaintiffs had due notice of the said rate pursuant to 27 & 28 Vict. c. 39, s. 5.

The plaintiffs objected before the assessment committee to the valuation list; the objections were overruled and the assessment confirmed.

After such confirmation the plaintiffs were summoned before the magistrates to shew cause why a distress warrant should not issue. They contended before the magistrates that they were not liable to pay the rate because, 1. They were not the occupiers; 2. The several coal-owners who rented the offices ought to have been rated in respect of the matters aforesaid.

The magistrates decided that they had no jurisdiction to

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interfere with the rate unappealed against, and therefore the distress warrant issued, and a levy was made under such warrant, in respect of which this action of replevin is brought.

Unless the above-mentioned facts, or any of them, establish an occupation, the plaintiffs are not occupiers.

The company contend that the levy was wrongly made for the following amongst other reasons:—1. That the rate is bad, as none of the property is in their occupation so as to render them liable to be rated; 2. That the rate is bad as including property not in any sense in their occupation, e.g., the stables.

The defendants contend that the rate is good and the distress rightly levied.

If the Court should be of opinion that the distress was wrongly levied, then the judgment of the Court was to be entered for the plaintiffs with costs, including their costs in the county court.

If the Court should be of opinion that the distress was lawful, their judgment was to be entered for the defendants with the like costs.

Littler, Q.C. (with him *R. E. Webster*), for the plaintiffs. First, there is a preliminary point as to it being open to the plaintiffs to contest the rating in this form.

[BLACKBURN, J. It is admitted that the plaintiffs are occupiers of some of the rateable property; surely it is the law that, if that is the case, replevin will not lie.]

Where there is one rate for the whole, and some part of the property rated is not in the occupation of the persons rated, it is open to them to dispute the validity of the rate in this form. The case of *Governors of Bristol Poor* v. *Waite* (1) is directly in point, that where there is an assessment for premises which a man occupies, and for other distinct premises which he does not occupy, the action lies. And *Milward* v. *Caffin* (2), if examined, will be found to be to the same effect: see also *Charleton* v. *Alway* (3), *George* v. *Chambers* (4), and *Rhymney Ry. Co.* v. *Price.* (5)

(1) 1 A. & E. 264.
(2) 2 W. Bl. 1330.
(3) 11 A. & E. 993.
(4) 11 M. & W. 149.
(5) 16 L. T. (N.S.) 394.

[BLACKBURN, J. There is, at least, enough doubt upon the point to make it necessary to go into the merits.]

It must be conceded that the exclusive occupation of none of the premises is given to the other parties by the plaintiffs, except of the stables. As to the stables, the agreement shews a demise at a monthly rent, notice to quit being expressly made necessary in order to make it incumbent on the lessees to give up possession. The clause as to the bye-laws does not necessarily imply that the plaintiffs are to retain any possession or control, and none of the bye-laws, it is found in the case, apply; the lessees simply agree to be bound by any bye-laws. It is to be observed, moreover, that it is expressly found that the plaintiffs have, in fact, exercised no control over the stables since the agreements. *Allan* v. *Liverpool* (1) will be relied upon by the defendants; but the agreements and facts there were very different from the present; there a present right of entry by the owners was reserved.

Thesiger, Q.C. (with him *A. Glen*), for the defendants. The defendants do not rely on the point that replevin will not lie. As to the stables, if the situation of the premises be considered and then the whole scope of the agreements be looked at, it is clear that they amount to a licence only to use stable accommodation in some one of the stables for four horses, and not to a demise of any particular stable. *Watkins* v. *Milton* (2), *Smith* v. *Overseers of St. Michael* (3), and *Reg.* v. *St. Mary Abbots* (4) are cases in point.

[BLACKBURN, J. The last case was affirmed lately in *Reg.* v. *Abney Park Cemetery Co.* (5)]

The clause in the agreement as to the bye-laws, is conclusive to shew that the plaintiffs did not intend to give up control over the stables.

[ARCHIBALD, J. The Companies Clauses Consolidation Act (8 Vict. c. 16), s. 124, fully authorizes a company to make bye-laws from time to time.]

Littler, Q.C., in reply.

BLACKBURN, J. I am of opinion that, upon the case as stated, we must find that the London and North Western Railway Com-

(1) Law Rep. 9 Q. B. 180.
(2) Law Rep. 3 Q. B. 350.
(3) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(4) 12 A. & E. 824.
(5) Law Rep. 8 Q. B. 515.

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pany were properly rated as occupiers of the whole of the premises which are the matter in dispute. The general rule of law, I believe, has been correctly stated on both sides. The occupier of any property is the person who has the sole and exclusive possession of it, and he is the person who ought to be rated. Whenever the owner of property demises it to another giving him the exclusive possession and occupation, so as to make him tenant of it, it is the tenant who should be rated and not the landlord. In this case, however, I do not think what was done did amount to a demise of any portion of this property, but merely to a giving of a licence to have the easement and use of it, analogous to the case of a lodger. The more important part of the case consists of the lines of rails and portions of property adjoining which are part of the company's premises, and it appears that it has been the practice of the company to let them out to coal-owners and stone merchants to store their coals and their stone on particular spots there. It does not appear from the case that there is the slightest ground for saying that these spots are irrevocably appropriated to the particular persons; on the contrary, it appears when one spot is not occupied by a particular person, and his coals or goods are not there, that the company's servants move the boundaries and allow another to occupy the spot. Therefore there is no pretence for saying that there is any more than an easement, and on that part of the case the plaintiffs fail.

Then it is contended that it is enough to vitiate the whole distress if any portion of the premises is shewn not to be in the occupation of the persons rated, and, consequently, the fact, as it is alleged, of the stables not being in the occupation of the London and North Western Railway, is enough to vitiate the whole rate. If that is the law, practically it becomes important, because it will be necessary, whenever there is a dispute as to the occupation of any portion, to make separate rates for every portion, which will be very inconvenient; but until the legislature or a superior Court decide otherwise, that, I suppose, will have to be done.

Then comes the question, which is the one we have to consider, whether the stables are or are not in the possession of the Clay Cross Company so that the Clay Cross Company are the occupiers and, as such, are to be rated. That depends entirely on

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this: The London and North Western Railway Company who are the owners and occupiers of the whole station, have a place there, inside which, and as a portion of which station, there was this stable. If in the agreement with the Clay Cross Company they agree that that company shall enter into and be possessed exclusively of this stable, and shall continue possessed until a month's notice shall be given, then the railway company have given them possession of this stable, and the Clay Cross Company are the occupiers; but if the effect of the agreement and the intention of the parties is this—We are occupiers of the station including the stable, and in that stable we do agree with you that we will give you the sole right of putting your horses, but ourselves retaining the control of our stable as part of our station, —then the railway company remain occupiers. Now, when we come to look at the terms of the agreement, we find the words are these: "We, the Clay Cross Company, in consideration of the London and North Western Railway Company permitting us to occupy and use a stable"—to occupy would seem to point more to the possession by a tenant, to "use" would look more like an easement; but the terms are ambiguous—"to occupy and use a stable for the accommodation of four horses, at or near the Clapham station of the said company, do hereby undertake and agree that we will pay the said railway company the clear monthly rent or sum of 1*l.* 5*s.*, the first payment to be made on the first day of March next." Then there is this: "And we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules and regulations which shall for the time being be issued or prescribed by the said railway company for the government and use of their railway stations, premises, and conveniences." It is on that clause of the agreement that my judgment, that the Clay Cross Company were but lodgers in this stable, proceeds. But I will read the rest: "And we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing." I quite agree that the words "quit and deliver up possession of the stable," the Clay Cross company having been in full and actual possession, would tend to shew that they were tenants and occupiers, and should be rated.

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But then the previous clause as to the bye-laws, &c., leads me to a contrary conclusion. Before this agreement was come to, it is quite clear this stable, which was situate within the fence of the company's premises, and which could only be got to by going through the gates of the company, was a portion of their premises and station. Thus it was highly prudent and desirable for the sake of the railway company that, when they were allowing a person to use this stable, they should not make a lease of it to him, but that they should retain to themselves the control and management of it as part of their station, though they gave him a licence that he should have the sole use; as in the case of a theatre, where the owner of the theatre gives to persons for a term the sole use of a private box or a stall, but never intends to let to them the entire occupation, but keeps himself the control and occupation of it as part of the theatre. I think, when we consider that that was the object, that it was very prudent and desirable for the company to have control, and when we find that they do say that they, the Clay Cross Company, "shall be subject to the bye-laws, rules, and regulations made for the government and use of the railway stations, premises, and conveniences," it amounts to a declaration, that whilst they are occupying and using the stable, the stable nevertheless shall remain part of the railway station premises and conveniences, and, as such, under the control of the railway company, and not let to the Clay Cross Company as tenants; and, consequently the railway company are the proper occupiers to be rated and not the Clay Cross Company. The judgment therefore should be generally for the defendants.

QUAIN, J. I am of the same opinion; though I must add that I have come to the conclusion with some hesitation. In coming to the conclusion that the rate was properly made upon the railway company, I have looked at the whole substance of what appears to be the arrangement between the parties. It is clear that, before this arrangement, these stables were a part of the railway station premises at that particular place at Clapham Junction; and these stables are within the curtelage, which curtelage is, undoubtedly, taking it as a whole, practically in the possession and occupation of the railway company. These stables can

only be approached by the roads over which the railway company undoubtedly have exclusive control, and they are entered by gates at the end of these approaches, which, I think, we may fairly infer, are under the control of the railway company. And therefore the railway company seem to be in possession and occupation of the whole of these premises; very much in the way the cemeteries were held, in the two cases that have been cited, to be under the control and in the possession of the cemetery companies. (1) When we come to look at the agreement, no doubt it contains ambiguous expressions, which may be construed either way; but if we look at the convenience of the thing, and the situation of the premises, and the general control evidently exercised, and intended to be exercised, over these stables of the railway company by the provision with regard to the bye-laws, I come to the conclusion that on the whole these stables are not in the occupation, in the strict sense of the word, of the Clay Cross Company or the other coal-owners, but remain in the occupation of the railway company, and that the railway company are the proper persons to be rated. Now, if we look at the words themselves of the agreement, I think it is singular that it does not profess to be permission to occupy and use any particular stable at all upon the land; and I am very much disposed to think that all they intended to give to the Clay Cross Company was stable-room for four horses, because the words are, "the company permitting us to use a stable;" not stable No. 4 or 5, or any particular stable, but "a stable for the accommodation of four horses at or near the Clapham Station." I do not think that construction of the agreement is contradicted by the other part of it. There are several stables, it seems, upon the ground; it is not one particular stable, but all these coal-owners appear to have similar accommodation; and as I read the agreement, all it really means to say is, that until the agreement has been terminated by a month's notice the company shall provide for the use and accommodation of these colliery owners, or coal-owners, stable accommodation for four horses. As I have said already, I have come to the conclusion at which I have arrived with some hesitation, which

(1) *Reg.* v. *St. Mary Abbots*, 12 A. & E. 824; *Reg.* v. *Abney Park Cemetery Co.*, Law Rep. 8 Q. B. 515.

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hesitation has been chiefly occasioned by this expression, a finding in the case, that the company have not, in point of fact, exercised any control over, or used any of the stables during the currency of these agreements. That expression undoubtedly, I think, is a very strong one, and is calculated to convey the idea of an exclusive occupation; but taking all the circumstances into consideration, looking at the character of the premises and the way in which they were used, and looking at the manifest convenience there is that the railway company should exercise control over their own premises, notwithstanding these agreements, I think it is safer and better and more convenient, when the terms of the agreement are ambiguous, to construe them as licences and not demises of the stables for the time being.

ARCHIBALD, J. As regards the first point, whether the rate can be disputed in this form, I think, when the cases are carefully considered, it does appear, where there is one entire rate, and a portion of the property is not in the occupation of the persons rated, that that does justify the bringing of an action of replevin and raising the question in this form, as to whether the matter has not been coram non judice. As regards all the premises except the stables, I quite agree with what has been said by my Brother Blackburn, and I do not think it necessary to add anything to what he said. The real and serious question arises on the point, as to whether the company are liable to be rated for these stables or not, and of course that depends on the intention of the parties to this agreement giving the use and occupation of the stables; and, after looking at the various provisions in the agreement, the only conclusion that I have been able to come to is, that it is not a demise of the stables, but a mere easement of occupation. The stables are included, as has been pointed out, in the curtelage of the station; before this agreement they were part of the premises, and when we find that the letting is subject to this, that the persons taking them agree to be bound by the bye-laws, rules, and regulations which shall from time to time be issued or prescribed by the railway company, I draw from that the inference that the railway company did not intend to part with them in such a way as to put it beyond their power to control them by their bye-laws;

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but they are still part of the property occupied by the company. As they have power to make bye-laws to regulate their affairs in the fullest way under the Companies Clauses Act, and might make bye-laws undoubtedly before this agreement was made, I think that power remains still; and I draw the conclusion, that it was not their intention to part with their control over these premises; and that consequently this does not amount to such a demise as to give the Clay Cross Company and the other parties the exclusive occupation of the premises in such a way as to make them the parties rateable; and that the railway company still remain liable to the rate. I agree, therefore, that in this case there ought to be judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *R. F. Roberts.*
Attorney for defendants: *J. C. F. Warrington Rogers.*

STEVENSON AND OTHERS *v.* THE MAYOR, &c., OF LIVERPOOL. *Dec. 10.*

Will—Direction to Executors to receive and pay Rents to H. for Life, with direct Remainder over—Bequest—Legal Estate—Assent of Executors to Bequest in remainder.

20 Eq 170
4 Ch D 460

A testator made the following will: "Subject to my debts, I bequeath to my wife the clear rentals of my two (leasehold) houses, Nos. 17 & 19, P. Street, for her life, to be paid to her every month; and after her decease I leave No. 17 (and other property) to my son R.; and I direct that the rents shall be received and the property be under the management of my executors. After R.'s decease I direct his share of the property be equally divided between his children; but, should he die without leaving lawful issue, I direct the same to be equally divided amongst the surviving children of my daughter M. A. C. I appoint my son-in-law J. C. and his wife M. A. C. my executors."

The executors proved the will, and collected the rents of the property, and paid the rents of No. 17 to the widow during her life, and, after her death, to R., who died without leaving issue:—

Held, 1. That the assent of the executors to the life estates was an assent to the bequest in remainder.

2. That, though there was no direct bequest, the executors took the legal estate in No. 17 as trustees, but only to the extent of the trust; and that after the death of R. the legal estate became vested in the surviving children of M. A. C.

EJECTMENT for a house, No. 17, Peter Street, Liverpool.

At the trial before Quain, J., at the Liverpool summer assizes,

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1873, a verdict was taken for the defendants, with leave to the claimants to move to enter the verdict for them, if the Court should be of opinion on the facts (which are fully stated in the judgment of the Court) that the legal estate was in them under the will of Robert Edgar.

A rule having been obtained accordingly,

June 1. *W. J. Robinson* (*Potter* with him) shewed cause.

Crompton, in support of the rule.

The arguments and points made appear in the judgment.

In addition to the authorities referred to in the judgment, the following were cited: *Doe* v. *Ironmonger* (1); *Robinson* v. *Grey* (2); 2 Jarman on Wills, 3rd. ed. pp. 274, 285, 286, ch. 34; *Barker* v. *Greenwood* (3); *Doe* v. *Sturges* (4); *Adams* v. *Pierce* (5); Com. Dig. Administration (C. 6); *Dix* v. *Burford* (6); *Paramour* v. *Yardley* (7); *Doe* v. *Tatchell* (8); *Fenton* v. *Clegg* (9); *Cole* v. *Miles*. (10)

Cur. adv. vult.

Dec. 10. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

QUAIN, J. This was an action of ejectment brought to recover possession of a house, No. 17, Peter Street, Liverpool, mentioned in the will of Robert Edgar, sen. The only question which we have to decide is, whether, at the time of action brought, the legal estate in the house was vested in the claimants or any of them. The house in question was a leasehold house held, with other property, by Robert Edgar, the testator, for the residue of a term of seventy-five years, beginning from the year 1836, and of which he became the assignee in 1840. Robert Edgar died on the 24th of April, 1847, having first made his will, dated the 24th of July, 1846, as follows:—

Subject to the payment of my just debts and funeral expenses and the charges of probate of this my will, I give, devise and bequeath to my beloved

(1) 3 East, 533.
(2) 9 East, 1.
(3) 4 M. & W. 421.
(4) 7 Taunt. 217, 221.
(5) 3 P. Wms. 11.
(6) 19 Beav. 409.
(7) Plowd. 539.
(8) 3 B. & Ad. 675.
(9) 9 Ex. 680; 23 L. J. (Ex.) 197
(10) 10 Hare, 179.

wife Ann Jane, for her own use, the clear rentals, without any incumbrances of ground rent or repairs whatever, of my two dwelling-houses situate and being Nos. 17 and 19 in Peter Street, and from the time of my decease and during her natural life, to be paid to her every month regularly, but to have no power to sell or mortgage or otherwise dispose of the same, together with all my household goods, and chattels, and ready money that I may be possessed of at the time of my decease; and after the decease of my said wife, I direct and bequeath to my daughter Mary Ann Cosnahan, the wife of James Cosnahan, the dwelling house No. 19, Peter Street, aforesaid, in her own right and for her to enjoy during her natural life, but with no power or authority whatever to sell, mortgage, or otherwise dispose of the same, but to have full power to leave the same to her child or children as she may think best so to do, but to no other person whatsoever. Also two other dwelling houses in Peter Street aforesaid, with the bakehouse and three dwelling houses at the back of the same, I leave to my son Robert, as well as the house No. 17, Peter Street, after the decease of my said wife, under the following restrictions, that he pays all my just debts and funeral expenses and the charges of the probate of this my will, as well as to keep the whole of my property herein described in good and tenantable repair, and paying all ground rent and other incumbrances, subject to the leases of the said property, without any power or authority whatever to sell, mortgage, or otherwise dispose of the same. And I further direct that my said son Robert is to have no power or authority whatever to receive any rents from, nor otherwise interfere in the management of, the said property, except as far as to receive his share of any surplus existing after payment of ground rent, repairs, and other incumbrances and incidental expenses once every six months; but that the said rents shall be received, and all matters appertaining to the property aforesaid to be under the management of my executor and executrix hereinafter named. And also I direct that after his decease his share of the within-named property aforesaid be equally divided between any children or to any child lawfully begotten by him; but should he die without leaving lawful issue as aforesaid, I then direct that the same be equally divided amongst the surviving children of my daughter Mary Ann Cosnahan, share and share alike. But should my son Robert neglect to pay what is herein described, I direct that my executor and executrix hereinafter named shall have full power to retain from his share of the within-named property a sufficiency to discharge the same. I further direct that the funeral expenses of my wife, already herein named, shall be borne and discharged by my said son Robert. And declaring this to be my last will, I nominate and appoint my son-in-law James Cosnahan executor, and his wife Mary Ann Cosnahan executrix, of this my last will.

This will was duly proved by James Cosnahan and his wife Mary Ann Cosnahan (testator's daughter); and the present claimants represent the surviving children of Mary Ann Cosnahan, and claim under the last bequest contained in the will. The executors collected the rents and paid over the rents of the houses Nos. 17 and 19 to Anne Jane Edgar during her life, according to the will, and the balance of the net rentals of the other property, after

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paying all expenses, to Robert Edgar, junior. Anne Jane Edgar died in December, 1861, and after that the rents of No. 17 were collected by the executors and paid to Robert Edgar, junior, according to the will. Mary Ann Cosnahan died on the 10th of May, 1852, and James Cosnahan, the surviving executor, died on the 7th of November, 1865, intestate.

In June, 1867, the defendants, under the power of compulsory purchase contained in their local Act, served a notice to treat for the purchase of No. 17 on Robert Edgar, junior. He took out administration de bonis non to the testator, and in July, 1867, conveyed the property to the defendants for the sum of 800*l*.

Robert Edgar, junior, died on the 25th of May, 1871, without leaving issue; whereupon the claimants, as representing or being the surviving children of Mary Ann Cosnahan, claimed the house No. 17 (No. 19 was not in question) as belonging to them under the will of Robert Edgar, senior, above set out.

We are of opinion that, Robert Edgar, junior, having died without issue, the claimants are entitled to judgment.

It was objected on behalf of the defendants, first, that there was no evidence of the assent of the executors to the residuary bequest to the surviving children of Mary Ann Cosnahan. But it is well established that the assent of an executor to the particular estate is an assent to the bequest in remainder: 2 Williams on Executors, p. 1276, 6th ed. (1) Here the executors received the rents and paid them over, first to Anne Jane Edgar for her life, and afterwards to Robert Edgar, down to the time of the death of the surviving executor. These acts, coupled with the fact that there were no debts or charges on the estate which the executors had to discharge, are ample evidence of assent to the legacies.

It was further contended for the defendants, that in this case the executors took the legal estate as trustees, having an active trust to perform; and that, to enable the claimants to recover in ejectment, they should have taken out administration to James Cosnahan, the surviving trustee. In the present case there is no direct bequest to executors as trustees, but that may be immaterial if the intention that they shall take the legal estate can be col-

(1) Pt. 3, B. 3; ch. 3, § 3; vol. 2, p. 1376, 7th ed.

lected from the whole will. The rentals of Nos. 17 and 19 are first left to the wife for life, to be paid to her monthly, and then the other property, as well as No. 17 after the wife's death, are left to Robert Edgar, junior, but with the restriction that he is to have no power or authority to receive any rents or otherwise interfere in the management of the property, but that the rents shall be received and all matters shall be under the management of the executors. There may be ground for contending that, under such a bequest as this, the legal estate in No. 17 vested in the executors as trustees during the life of Anne Jane and of Robert Edgar, in order that they might receive and pay over the rents as directed. But on the death of Robert Edgar without issue, his share is specifically bequeathed to the surviving children of Mary Ann Cosnahan, with regard to whom there is no trust to be performed. Now, the rule of construction in such cases is, that the trustees take estates co-extensive with the trusts they have to perform; and that, if the performance of the trust require only that the legal estate shall be vested in them for a limited time, they take it only for that period: 2 Jarman on Wills, p. 271, 3rd ed., and cases there cited. Applying this rule to the present case, the legal estate in No. 17 may have vested in the executors during the lives of Ann Jane and Robert Edgar, but, on the death of the latter without issue, there was no further trust to be performed; and we think that the legal estate vested in the surviving children of Mary Ann Cosnahan; and that the claimants are therefore entitled to our judgment.

Rule absolute.

Attorney for claimants: *Redhead.*

Attorneys for defendants: *Venn & Son, for Town Clerk of Liverpool.*

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Nov. 14.

BARTON, APPELLANT; PIGGOTT AND ESKRETT, RESPONDENTS.

Highway—Team Work done by Surveyor—Surveyor's Accounts—Allowance of illegal Charges by Justices—5 & 6 Wm. 4, c. 50, ss. 44 & 46.

By s. 46 of 5 & 6 Wm. 4, c. 50, a penalty is imposed on any surveyor of highways who shall have any interest, directly or indirectly, in any contract for work or materials to be done or provided for any of the highways under his care or management, or shall let to hire any team to be used in making or repairing such highway, unless a licence in writing be first obtained from two justices in special sessions assembled. By s. 44 the accounts of the surveyor are to be laid before the justices at special sessions, and if any complaint be made against the accounts, the justices, if they shall think fit, are to examine the surveyor on oath, and to make such order thereon as to them shall seem meet.

A surveyor of highways having charged in his accounts certain items for work and materials and team hire, which were illegal under s. 46, the justices in special sessions, on complaint made to them, after examining the surveyor on oath, made an order, under s. 44, allowing the accounts:—

Held, that the charges were made illegal by s. 46; and the justices had therefore no discretion under s. 44, and the order allowing the accounts was bad.

CASE stated by justices of Staffordshire under 20 & 21 Vict. c. 43.

At a special sessions for the highways in the petty sessional division of Penkridge, on the 29th of July, 1872, a complaint was preferred by the appellant, a person chargeable to the highway rates for and an inhabitant of the liberty of Hednesford, against the accounts of the respondents, as the late surveyors of the highways of the liberty, and of the application of the moneys received by them during their tenure of office, which expired on the 3rd of June then last (1), which complaint was stated as follows:—

1. That of the amount stated in the accounts to have been

(1) By s. 44 of 5 & 6 Will. 4, c. 50: "That within fourteen days after the election or appointment of surveyor . . . the accounts . . . made in writing and signed by the surveyor . . . for the year preceding of all moneys received and disbursed by virtue of this Act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, . . . and within one calendar month after the election or appointment of surveyor . . . the accounts shall be signed by the surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways . . . and such justices are hereby authorized and required to examine him as to the truth of the accounts or of any

paid to William Simcox, 6*l.* 16*s.* 6*d.* part thereof, has not been paid. 2. That of the amount stated in the accounts to have been paid to John Peake, no part thereof has been paid. 3. That of the amount stated in the accounts to have been paid to Bartholomew Bate, 26*l.* 6*s.* 6*d.*, part thereof, has not been paid. 4. That the late surveyors are not entitled to take credit in their accounts for the sums not so paid, nor for the sum of 26*l.* 18*s.* credited in their accounts as a payment to Francis Piggott for team work and materials alleged to have been done and supplied by him.

At the hearing of the complaint, Francis Piggott, one of the respondents, produced the accounts which were signed by him and the co-respondent, and stated that the accounts presented to the justices for allowance (and which appeared on the face of them to have been submitted to and allowed at the annual vestry for allowing such accounts, which vestry was numerously attended, and which accounts were signed by the chairman and many of the ratepayers as being allowed by them) contained the whole of the moneys received and expended by the respondents as surveyors of

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charge contained therein. Provided that if any person chargeable to the rate authorized to be made by this Act has any complaint against such accounts or the application of the moneys received by the surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts; and the justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet. . . ."

By s. 46: "That in every parish the surveyor may and is hereby authorized, with the consent of the inhabitants in vestry assembled, to contract for purchasing, getting, and carrying the materials required for the repair of the highway; and if any surveyor shall have any part, share or interest, directly or indirectly, in any contract or bargain for work or materials to be made, done, or provided upon, for, or on account of any of the highway or other works whatsoever under his care or management, or shall upon his own account, directly or indirectly, use or let to hire any team, or use, or sell, or dispose of any materials to be used or employed in making or repairing such highway or other works (unless a licence in writing for the sale of any such materials, or to let to hire any such team, be first obtained from two justices of the peace in special sessions assembled), he shall forfeit for every such offence, on conviction, any sum not exceeding ten pounds, and be for ever after incapable of being employed as a surveyor with a salary under the authority of this Act.

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the highways for the liberty of Hednesford. That the sum of 26*l.* 6*s.* 6*d.* therein charged for gravel was for gravel supplied from his, Piggott's, own pit, but that he had charged nothing for it beyond royalty. That the amount of 26*l.* 18*s.* charged for team work in the accounts was for work done by his own horses and part of Peake's bill. That all the work charged for was done, and that he only employed his own horses when he could not get other horses. That the several sums stated in the account as having been paid to John Peake, Thomas Salt, and William Simcox, and for which vouchers signed by them were produced, had not been so paid to them by the surveyors, but that the vouchers were obtained to meet any question of irregularity if the account appeared in Piggott's name.

It was contended by the appellant that, inasmuch as Piggott had used his own horses for team work without an order of the justices as required by law, the charges were illegal and could not be allowed by the justices. No attempt was made by the appellant to shew that the goods had not been supplied or that the work had not been done, but only that it had been done illegally. The appellant's attorney stated that there was no desire to inculpate the respondent Thomas Eskrett in the charge of having acted illegally, but that he should be exonerated altogether from blame in the matter; and the appellant was prepared to give an undertaking to that effect.

The respondents did not deny the irregularities complained of, but Piggott stated that, in some of the vouchers produced, the items charged were partly supplied by the persons signing the same and partly by himself, and that when the accounts were made out, they were charged for in the names of the several parties, as set forth in the complaint, and receipted by them. That unless Piggott had used his own horses the required work could not have been done and great inconvenience would have arisen. That the objections raised by the appellant to the accounts were not raised in order to shew that the liberty, or the ratepayers therein, had been defrauded in any way, or from any sense of public duty, but solely out of private pique towards Piggott (the acting surveyor) because, as was proved before the

justices, a presentment had been made by the respondents (or rather by Piggott, as such acting surveyor) against the appellant for an encroachment on one of the highways in the liberty in the erection of a building.

The justices,—considering that no fraud had been committed or contemplated by the respondents, and that the statements as to the impossibility of obtaining horses for team and other work on the highways were correct, and that the accounts had been audited and allowed by a meeting of the ratepayers of the liberty, and on being informed, in reply to an inquiry made by them of the agents of two of the largest ratepayers in the liberty, who were then present, that the work had been well and economically done, and believing the reason assigned for the appellant's objections to the accounts to be true,—allowed and passed the accounts.

The opinion of the Court was asked whether, under the circumstances, the opinion of the justices was correct.

Anstie, for the appellant. The justices have come to a wrong conclusion in allowing the items to which exception had been taken. Sect. 46 of 5 & 6 Wm. 4, c. 50, says that a surveyor of highways shall not let for hire any team, nor have any interest in any contract for work or materials to be done or provided for any highway, unless he first obtains a licence from two justices; and it imposes a penalty for every offence. The effect of the enactment is, that all such contracts made by surveyors on their own account are absolutely illegal. In *Taylor* v. *Crowland Gas and Coke Co.* (1) Parke, B., states the law thus: "The true principle is laid down in *Cope* v. *Rowlands* (2) and *Smith* v. *Mawhood* (3); and the question in all these cases is, whether, looking at the statute, the object of the legislature in imposing a penalty was to prohibit the particular act, or whether it was for a different purpose." The intention of the legislature, clearly, is to prohibit a surveyor from making a profit out of the office he holds, and this particular act is prohibited by imposing a penalty. The items objected to in the

(1) 10 Ex. 293; 23 L. J. (Ex.) 254. (2) 2 M. & W. 149.
(3) 14 M. & W. 452.

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accounts of the surveyor being illegal, the justices had no power to allow and pass them.

A. S. Hill, Q.C. (*Bosanquet* with him), for the respondents. The justices have a discretion under s. 44 to allow and pass the items objected to. On a complaint against the accounts of the surveyor the justices have power to hear the complaint and, if they shall think fit, to examine the surveyor upon oath, and to make such order thereon as to them shall seem meet. Here there has been an inquiry before the justices, and they have arrived at the conclusion that, under all the circumstances of the case, the fact of the surveyors not having obtained the certificate of two justices before they performed the team work and supplied the materials was a mere irregularity, and they have therefore, as they had a discretion, allowed and passed the items.

Anstie, in reply, cited *Townsend* v. *Read* (1) and *Taylor* v. *Stansfield*. (2)

BLACKBURN, J. I think that we must give judgment in favour of the appellant. The question is, whether the legislature, in s. 46, intended simply to impose a penalty on a surveyor who acts in contravention of its provisions, or whether it intended to declare that a contract by the surveyor to perform work or to supply materials for any highway under his care should be altogether illegal. I think that the intention was to prevent such a contract being made at all, and consequently, these contracts being forbidden, they are altogether illegal. The surveyor must not on his own account have any dealings with the parish in respect of the highways under his management, unless he first obtain a licence in writing from two justices. By s. 44 a ratepayer can make a complaint before justices at special sessions against a surveyor's accounts, and on the hearing of the complaint, the justices are to examine the surveyor on oath, and to make such order as to them shall seem meet. In this case, on the appeal to the justices, the order which it seemed to them meet to be made was, that the charges for work which the legislature has said are illegal shall be allowed. They have a discretion under s. 44 to allow or disallow

(1) 10 C. B. (N.S.) 317; 30 L. J. (M.C.) 245. (2) 6 L. T. 26.

items in the accounts, but it would be inconsistent to hold that they have a discretion to allow items which are declared to be illegal by another section of the same statute.

MELLOR, J. I have arrived at the same conclusion. It could not have been the intention of the legislature that the justices should have any discretion to allow payments which are expressly made illegal by s. 46. The contracts in respect of which these payments were allowed by the justices are void under s. 46; the justices, therefore, have come to a wrong conclusion.

ARCHIBALD, J. We are bound to give a consistent construction to the two sections of the statute. Sect. 46 absolutely forbids the surveyor from entering into such contracts as he has in this case made. If we decided this case in favour of the respondents, it would amount to holding that the justices had a discretion to allow payments made on contracts which are absolutely void. It was never intended by s. 44 to give the justices a discretion to allow payments which are illegal. There are a large number of items on which, no doubt, under that section, they may exercise a discretion, items which it may be said are erroneous charges, or overcharges, but they have no discretion to allow an illegal charge.

Judgment for the appellant.

Attorneys for appellant: *Duignan & Co.*
Attorneys for respondents: *Sharp & Ullithorne.*

1874
Nov. 10.

THE EDGEWARE HIGHWAY BOARD *v.* THE HARROW DISTRICT GAS COMPANY.

Highway Board—Licence to open Surface of Highway—Consideration—Illegal Contract.

The plaintiffs, a highway board, agreed with the defendants, a gas company, that if the plaintiffs would give the defendants a licence to open a highway in their jurisdiction, the defendants should make good the surface of the road, and would pay to the plaintiffs 1*s.* per yard of the highway so broken up:—

Held, that the contract was valid; for that the agreement of the plaintiffs to allow the defendants to interfere with the surface of the road was a good consideration, and the contract was not illegal and did not necessarily contemplate the creation of a nuisance by the defendants.

DECLARATION that certain persons formed themselves into a gas company under the name of the Harrow Gaslight and Coke Company, Limited, for the purpose of supplying certain places with gas, and afterwards it was agreed between the plaintiffs and the company that, if the plaintiffs would give to the company their licence to open a certain public highway, the same being within the jurisdiction, and management of, and vested in the plaintiffs as the Edgeware Highway Board, the company would make good the surface of the road which might be disturbed or damaged thereby, and would pay to the plaintiffs 1*s.* per yard of the highway so opened. That, by the Harrow Gas Act, 1873, it was enacted that the limited company should be dissolved and the subscribers to the undertaking of the limited company should be and were united into a company for the purpose thereinafter mentioned, and should be incorporated by the name of the Harrow District Gas Company, and by that name should be a body corporate, with power to purchase and hold land. That, except by the Act otherwise specially provided, all contracts, bonds, and agreements entered into by the limited company, or by any other person to whose rights and liabilities they had succeeded, should be of as full effect against or in favour of the incorporated company (being the defendants) and might be enforced as fully and effectually as if, instead of the limited company, the incorporated company had been a party thereto, and

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that the defendants should in all respects be subject to and should discharge all obligations and liabilities to which the limited company, before the passing of this Act, were subject. That the agreement between the plaintiffs and the limited company was a contract binding and of as full force against the defendants as if they had been a party thereto by the force and operation of the Act. And, that after such licence was given by the plaintiffs, the highway was opened under such licence for 1476 superficial yards, whereby the highway became and was greatly disturbed and damaged. Averment, that all conditions precedent had been performed. Breach, that neither the limited company nor the defendants did make good the surface of the highway so disturbed and damaged, nor pay to the plaintiffs the sum of 1*s.* per yard in respect of the 1476 yards so opened, whereby the plaintiffs had been and were greatly damnified and aggrieved, and had been put to great expense in making good the surface of the highway.

Demurrer and joinder in demurrer. (1)

Baylis (*Daniel* with him) for the plaintiffs. It will be said on the other side that the Highway Board have no power to prevent the breaking up of the road, and therefore that there is no consideration for the agreement. The licence to open the highway having been given to the defendants, and they having acted on it, it does not lie in the mouth of the defendants to say that the plaintiffs have no power to give the licence: *Bird* v. *Higginson*. (2) There is ample consideration for the agreement; the adequacy of consideration is immaterial: *Dutchman* v. *Tooth*. (3) The plaintiffs are a highway board constituted under s. 5 of 25 & 26 Vict. c. 61, and they have the same duties and the same powers given them by s. 11 as a surveyor of highways has under 5 & 6 Wm. 4, c. 50. By s. 17 they are to maintain and keep in repair the highways, and ss. 18 & 19 point out the proceedings to be taken

(1) There was a second count for money due to the defendants for the licence given to the plaintiffs to open the surface of the highway.

Plea, that the causes of action in the second count arise in respect of the identical contract alleged in the first count.

Demurrer to the plea and joinder.

(2) 6 A. & E. 824.

(3) 5 Bing. N. C. 577.

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when a road is out of repair. By s. 72 of 5 & 6 Wm. 4, c. 50, a penalty is imposed on all persons who shall wilfully destroy or injure the surface of any highway. If the defendants had, without a licence, opened the surface of the highway, the plaintiffs would have had to repair it, and they could have proceeded against the defendants for penalties, and so have prevented them from opening the highway. There is, therefore, a sufficient consideration for the licence. Secondly, the agreement is not unlawful.

[BLACKBURN, J. On that point we will hear the other side.]

Philbrick, Q.C. (*Fitzgerald* with him), for the defendants. There is no consideration for the agreement set out in the declaration. No part of the soil of the highway is vested in the highway board as surveyors, neither could any action lie against them for damages resulting from an accident caused by the non-repair of a highway: *Young* v. *Davis*. (1) Under ss. 11 & 17 of 25 & 26 Vict. c. 61, the plaintiffs have certain duties and powers conferred on them. They are bound to repair the highway and maintain it in repair, but they have no power whatever to authorize the opening of the surface of the highway. Secondly, the agreement is illegal. It is an agreement to commit a nuisance on the highway. To obstruct a highway by breaking up the surface is an indictable offence: *Reg.* v. *Longton Gas Company* (2); and is therefore illegal.

Baylis was not heard in reply.

BLACKBURN, J. I think that our judgment ought to be for the plaintiffs. They are a Highway Board, performing the same duties and having the same powers as a surveyor would have if elected by the inhabitants of a parish under 5 & 6 Wm. 4, c. 50. The surveyor is the officer of the parish who de facto has the control of the highways and the right to prevent persons from doing things injurious to the highway. If any person attempted to open the soil of the highway the surveyor would be the proper person to stop him from breaking up the road, and it would be incumbent on the surveyor to have the surface made good.

(1) 2 H. & C. 197; 31 L. J. (Ex.) 250. 8 Jur. N.S. 256. 10 L T 77

(2) 2 E. & E. 651; 29 L. J. (M. C.) 118. 6 Jur. N.S. 681.

Under these circumstances the plaintiffs, as surveyors of highways, are applied to by the defendants, who are a gas company, for permission to break the surface of the highway in order to lay down gas pipes. In answer to this application the plaintiffs say they will grant a licence on certain terms, and these terms are stated in the record to be that the company shall make good the surface of the road which would be disturbed or damaged, and shall pay to the plaintiffs 1s. per yard for the highway opened. I am of opinion that a sufficient consideration is shewn. A consideration is sufficient if there be a benefit to the defendant or a detriment to the plaintiff. The plaintiffs have the right to say to the defendants that they are not to meddle with the surface of the highway; and if the defendants did meddle with the highway without the leave of the plaintiffs, they would be liable to a penalty under s. 72 of 5 & 6 Wm. 4, c. 50. I do not think that the licence to open the highway is necessarily a licence to commit an indictable offence. It is quite possible to open the highway within the terms of the agreement without creating a nuisance. It is true that the public cannot use the spot opened, and if the defendants opened too much of the road at one time it might be a nuisance, but they cannot take the objection that they themselves by their own fault might create a nuisance. I am of opinion that there is nothing to shew that the bargain is tainted with illegality.

MELLOR, J. I am satisfied that the allegations on the record do not shew that necessarily the licence is one to commit an indictable offence. Secondly, if certain parties come together, and one, assuming that the other has authority to give a licence to open a highway, agrees that, if the licence be given, he will restore the road to its original good condition and also pay a certain sum of money, I am of opinion that there is a good consideration for the agreement.

LUSH, J. I am of the same opinion. I must own that from the very first I thought that this was a very clear case. The first objection is that the contract is nudum pactum for want of a consideration. The agreement is that if the plaintiffs would give

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to the defendants their licence to open a certain public highway the defendants would make good the surface of the road, and would pay to the plaintiffs 1*s.* per yard of the highway so opened. Now the 1*s.* per yard to be paid to the plaintiffs is evidently stipulated for to compensate them for the expenses they would incur for any sinking of the road that might take place afterwards, the filling up of which is a duty cast on the plaintiffs as surveyors. It appears to me that there is ample consideration for the agreement. There is both a benefit to the one party and a detriment to the other—a detriment to the plaintiffs, inasmuch as they are charged with the duty of repairing and maintaining the highway, and would have had to incur costs for this purpose; and a benefit to the defendants, who could not have opened the highway without the consent of the plaintiffs, and who forbore to exercise their power of preventing the defendants from opening the highway. Secondly, it was said that the agreement is illegal, that the plaintiffs are authorizing an indictable offence. But there is nothing to shew that this is so, and even if it were, as at present advised, I doubt if the defendants could set up as a defence that the contract is illegal.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Tilley & Liggens.*
Attorney for defendants: *Weightman.*

BANKS, APPELLANT; CROSSLAND, RESPONDENT. 1874
Nov. 11.

Master and Servant—30 & 31 *Vict. c.* 141, *s.* 3, *sch.* 1—4 *Geo.* 4, *c.* 34, *s.* 3—*Proceedings against Servant who has not entered into Service—Parol Contract not enforceable—Statute of Frauds, s.* 4.

By a parol hiring on the 11th of November, respondent agreed to serve appellant as a servant in husbandry, for one year, to commence on the 23rd of November. Respondent did not enter into his service, and an information was taken out against him under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), by s. 3 of which nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments in the first schedule to this Act, or some or one of them. By s. 3 of 4 Geo. 4, c. 34 (which is in the schedule), proceedings can be taken against a servant in husbandry who has not entered into his service only if the contract be in writing signed by the parties to it:—

Held, that no proceedings could be taken against the respondent under the Act of 1867.

Held, also, that, as the contract was not to be performed within a year, and was not in writing, s. 4 of the Statute of Frauds would have prevented the enforcing of the contract.

CASE stated by justices of the East Riding of Yorkshire under 20 & 21 Vict. c. 43.

Upon the hearing of an information,—preferred by the appellant against the respondent under s. 4 of the "Master and Servant Act, 1867" (30 & 31 Vict. c. 141), that the respondent did at Howden, in the said Riding, on the 11th of November, 1873, enter into a certain contract with the appellant to serve him as a servant in husbandry for a period unexpired at the date of preferring the information, but that the respondent had neglected to enter into such service contrary to the form of the statute, and claiming 3*l.* as compensation for the non-performance of the contract,—the justices dismissed the information without costs.

The following facts were either proved or admitted by both parties.

The contract of hiring was by parol only, at Howden statute hirings, held on the 11th of November, 1873, and was, that the respondent should serve the appellant as a servant in husbandry for one year, to commence at Martinmas (23rd November), 1873, at the wages of 13*l.*, the appellant paying to the respondent 3*s.* for

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his fastening money, which money was returned, on the 30th of November, 1873, by the respondent to the appellant, and retained by him.

The respondent did not enter into his service according to his contract, but refused so to do.

The justices were of opinion that the contract, not being in writing, was within the meaning of s. 4 of the Statute of Frauds, as a contract not to be performed within a year from the making thereof, and therefore inoperative.

The justices were also of opinion that, prior to the passing of the "Master and Servant Act, 1867," justices had no jurisdiction to adjudicate in cases of masters and servants in husbandry, except under 20 Geo. 2, c. 19 (s. 2), in the case of servants who had actually entered upon their employment; or under 4 Geo. 4, c. 34, s. 3, in the case of servants who had refused to enter upon their employment, and where there had been a contract in writing and signed by the contracting parties; the justices were also of opinion that as the above-mentioned Acts of 20 Geo. 2, c. 19, and 4 Geo. 4, c. 34, are included in the first schedule to the "Masters and Servants Act, 1867," the latter Act is by s. 3 limited in its operation to cases within the above Acts of Geo. 2 and Geo. 4; and that therefore they had no jurisdiction to convict the respondent or make any order upon him in this case. (1)

The question of law for the opinion of the Court was, whether the justices were right in dismissing the information.

Gibbons, for the appellant. The justices ought to have convicted. First, s. 4 of the Statute of Frauds does not avoid the

(1) 30 & 31 Vict. c. 141, s. 3: Nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act, or some or one of them, or to any employer or employed other than the parties to a contract of service to which this Act applies as aforesaid, or to any case, matter, or thing arising under or relating to any contract of service, or arising between employer and employed, other than cases, matters, and things to which the said enactments respectively apply; and in respect of all contracts of service, employers, employed, cases, matters, and things to which this Act applies, the respective provisions of this Act shall be deemed to be and are hereby substituted for such of the said enactments, or so much or such parts of the same, as would have applied thereto if this Act had not been passed. . . . .

contract if not in writing, but only forbids an action to be brought upon it: *Crosby* v. *Wadsworth.* (1)

[MELLOR, J. It would certainly be very anomalous if a person could be punished criminally for not performing what the law will not compel him to perform in a civil action.]

In *Laythoarp* v. *Bryant* (2) the distinction in this respect between s. 17 and s. 4 is pointed out, and was acted upon in *Leroux* v. *Brown.* (3)

[LUSH, J. By s. 3 of 30 & 31 Vict. c. 141, the Act only applies to contracts within the statutes in the schedule; is not that fatal to the appellant's case? There was no writing here, and the respondent did not enter into the service.]

That is the second ground of the justices' decision; but in *Crane* v. *Powell* (4) Willes, J., expressly declined to give any opinion upon the point whether the jurisdiction of the justices under the Act of 1867 was confined to cases within 20 Geo. 3, c. 19, and 4 Geo. 4, c. 34; and Brett, J., had "very considerable doubts whether, in order to bring the case within the late statute, the contract need be such as would have given jurisdiction to the magistrates under 4 Geo. 4, c. 34, or one of the statutes mentioned in the schedule." By s. 2, "a contract of service" shall include any contract, whether in writing or by parol, to serve for any period of time, or to execute any work.

[BLACKBURN, J. I confess I cannot see the ground for the doubts of my Brother Brett.]

Kingsford, for the respondent. Brett, J., certainly expressed doubts; but it became unnecessary to decide the point, as the Court were agreed that there was a contract in writing. Sect. 3 of the Act cuts down the wider definition in s. 2, so far as it is wider than the contracts in any of the statutes mentioned in the schedule. On the other point, the intention of s. 4 of the Statute of Frauds and the effect of the enactment are, that a contract, if not in writing, and not to be completed within a year, shall not be enforced at all.

Gibbons, in reply.

BLACKBURN, J. I am of opinion that the magistrates were

(1) 6 East, 602.
(2) 2 Bing. N. C. at pp. 745, 747.
(3) 12 C. B. 801, 827; 22 L. J. (C.P.) 1.
(4) Law Rep. 4 C. P. at pp. 129, 131.

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right in dismissing the information on both grounds. By s. 3 of 30 & 31 Vict. c. 141, nothing in this Act is to apply to any contract of service other than a contract within the meaning of the enactments in the first schedule, or some or one of them, and the provisions of this Act are to be deemed and are substituted for such of the enactments as would have applied if this Act had not been passed. That seems to me clearly to confine the enactments of the new Act to cases of which the circumstances would have been within the old Acts. In *Crane* v. *Powell* (1), the Court decided that the letters made out an agreement in writing. My Brother Brett, however, says: "It is said that the contract would not have been within 4 Geo. 4, c. 34, or any of the other Acts mentioned in the first schedule to the new statute, because it was not in writing, and the service had not been commenced. That raises two questions—first, whether there was a contract in writing, secondly, whether, if not, it was necessary that there should be such to bring the case within the late statute. Now, I must say that I have very considerable doubts whether, in order to bring the case within the late statute, the contract need be such as would have given jurisdiction to the magistrates, under 4 Geo. 4, c. 34, or one of the other statutes mentioned in the schedule." The learned judge does not explain the reasons for his doubts, and I confess I cannot discover them. The enactments of the new Act are only to apply to cases within the Acts mentioned in the schedule; consequently, as any contract for service in husbandry which has not been entered into can only be enforced under the old Act of Geo. 4 if it be in writing signed by both parties, the new Act does not extend to it. I also think the first ground good, which the magistrates took under s. 4 of the Statute of Frauds, which says that no action shall be brought, inter alia, upon any agreement that is not to be performed within one year from the making, unless the agreement shall be in writing. That, I think, is equivalent to saying that such an agreement shall not be enforceable generally, and to proceed under the new statute would be to enforce the agreement.

MELLOR, J. I am of the same opinion. I confess I do not agree in the doubts expressed in the Court of Common Pleas. It seems clear that the contract under the new Act must be a contract which

(1) Law Rep. 4 C. P. 123, 130.

under some one of the statutes in the schedule could have been enforced. It is clear also that this was a contract which, at the time of the making of it, could not have been enforced by an action at law by reason of the Statute of Frauds. It certainly would be most extraordinary if a man could be treated as a criminal for not performing a contract which could not be enforced against him by civil process.

LUSH, J. I am of the same opinion. It is said that there is an inconsistency between s. 2 and s. 3. That may be so in terms; we must find out the intention of the legislature. The object of the statute was to bring together the various enactments as to the employed and employers; and all the Acts are brought into one schedule, and all are virtually repealed in s. 3 by the substitution of the enactments in the new Act; and it is clear that the intention is to include all cases within the repealed Acts, but no more. Sect. 2 says, "the words 'contract of service' shall include any contract, whether in writing or by parol, to serve for any time, or to execute any work, and to any contract of apprenticeship, whether entered into before or after the passing of this Act." The only object of this was to prevent repetition, and there is, therefore, no contradiction to s. 3. Then 4 Geo. 4, c. 34, s. 3, says, "if any servant in husbandry, &c., shall contract with any person to serve him for any time, and shall not enter into or commence his service (such contract being in writing, and signed by the contracting parties), or having entered into such service, shall absent himself from his service (whether such contract be in writing or not)," summary proceedings may be taken before justices. In the present case the contract was without writing, and the respondent did not enter into the service at all, so that he could not have been proceeded against under the Act of Geo. 4. Consequently the new Act does not extend to the case. I am inclined to agree, as to the other point on the Statute of Frauds, that, where a statute forbids the enforcing of a contract by civil process, it cannot be enforced by criminal process; but it is unnecessary to express an opinion on the point, as the other point disposes of the information.

Judgment for the respondent.

Attorneys for appellant: *Ridsdale & Craddock.*

Attorney for respondent: *W. Eley.*

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Nov. 11.

HAIGH, APPELLANT; THE TOWN COUNCIL OF SHEFFIELD, RESPONDENTS.

Betting House Act (16 & 17 *Vict. c.* 119), *ss.* 1, 3—"*Place*"—"*Knowingly and wilfully permitting Place to be used for the Purpose of betting.*"

The appellant was charged on a summons under the Betting House Act (16 & 17 Vict. c. 119), ss. 1 and 3, with knowingly and wilfully permitting a place of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. On the hearing it was proved that the appellant occupied as tenant a house, with a piece of inclosed ground adjoining, used for cricket, foot-racing, and other games and sports. On the day named in the summons foot-racing took place in the grounds, to which persons were admitted on payment of 6*d.* Within the grounds, but outside the space reserved for the runners, and amongst the spectators, some fifteen or twenty professional bettors stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying 1*s.* each, and receiving a ticket. The evidence satisfied the magistrate that the appellant knew of what was going on and took no steps to prevent it, and that he might have prevented it if he had been so minded; and he accordingly convicted the appellant of the offence charged:—

Held, that the conviction was right.

Eastwood v. *Miller* (Law Rep. 9 Q. B. 440) approved.

CASE stated by the police magistrate of Sheffield, under 20 & 21 Vict. c. 43.

A summons was heard on the 5th of December, 1873, on an information charging that the appellant on the 21st of July, 1873, being then the occupier of a certain place, to wit, Hyde Park Cricket Ground, situate at the Park in the said borough, unlawfully, knowingly, and wilfully did permit the said place to be used by George Trickett and others for the purpose of betting with persons resorting thereto, contrary to the form of the statute.

This charge was framed under 16 & 17 Vict. c. 119, which enacts that "no house, office, room, or other place shall be opened, kept, or used for the purpose," among others, "of the occupier, owner, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any way conducting the business thereof, betting with persons resorting thereto." Sect.

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3, under which the information was laid, imposes a penalty on any person who, "being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them;" and also, on any person who, "being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them."

The appellant occupies as tenant a house, together with a piece of inclosed ground adjoining, called Hyde Park Cricket Ground, used for cricket, foot-racing, and other games and sports. On the day named in the summons foot-racing took place in the grounds, to which persons were admitted on payment of 6*d*. Within the grounds, but outside the space reserved for the runners, and amongst the spectators, some fifteen or twenty persons, being clearly professional bettors (George Trickett being one of them), stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons. A man behind each of the professional bettors recorded the bets in a book. The persons betting payed money (1*s*. each) and received a ticket. A large number of persons assembled in the grounds, to the number of upwards of 10,000. Although there was nothing to shew the terms on which Trickett and the other professional bettors were admitted to the grounds, the evidence satisfied the magistrate that the appellant knew of what was going on, and took no steps to prevent it; and that he might have prevented it if he had been so minded. No attempt was, indeed, made on the part of his counsel to controvert that part of the case. Further, although his counsel did attempt to contend that the space of ground was not a "place" within the statute, the magistrate was of opinion that it was. Blackburn, J., in giving judgment in *Doggett* v. *Catterns* (1) in the Exchequer Chamber, while holding with the rest of the Court that a spot under a tree in Hyde Park resorted to for the purpose of betting was not a "place" within the Act (reversing the decision of the Court of Common Pleas), is reported to have observed: "I do not say that an open field is not a place which may come within the

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.

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description of the term 'place' in the statute." On the other hand, the counsel in support of the respondents declined to contend that the use of a chair or stool constituted each particular spot where Trickett and the betting men stood a "place" as distinguished from the Hyde Park Cricket Ground generally. There is an obvious distinction between a chair and the wooden structures on the Doncaster race course, which in *Shaw* v. *Morley* (1) was held to be an "office" and "place" within the Act.

The real question in the case, as it seemed to the magistrate, was one quite distinct from the reported cases, and was this: Was there a user by Trickett of the Hyde Park Cricket Ground for the purpose of betting with persons resorting thereto within the meaning of the Act? But more closely the question is: Does the statute include an incidental and partial use of a place for betting purposes, or is it confined to what may be termed either a "paramount" or "dominant" or "governing" use? The grounds are really used for the purpose of foot-racing and other games and sports, and they are occupied by the appellant as tenant for those purposes; and if, from being declared unlawful, or from any other cause, the practice of betting as above described were to cease, the grounds would in every other respect be occupied by the appellant, and used for the purposes and with all the other incidents heretofore existing.

In matter of fact as well as law there was no occupation or user by the appellant himself of this place for any prohibited purpose; but, on the other hand, the magistrate found as a matter of fact (as a legitimate deduction from the evidence) that Trickett resorted to the grounds for the sole or principal object of betting with other persons.

The magistrate entertained doubts as to whether the appellant had committed the particular offence charged. Still the ultimate inclination of his opinion was that the appellant had brought himself within the four corners of the Act; and he was the more inclined to take this view because he could not doubt that this system permitted by the appellant is within the mischief sought to be suppressed, that is, that it tends, in the language of the Act, "to the injury and demoralisation of improvident persons." The

(1) Law Rep. 3 Ex. 137.

magistrate, therefore, convicted the appellant of the offence charged in the nominal penalty of 1*s*.

The question of law for the opinion of the Court was, whether the evidence and facts warranted the conviction.

Philbrick, Q.C. (with him *Crompton*), for the appellant. First, this ground was not "kept" by the appellant for the purposes of betting within 16 & 17 Vict. c. 119. The appellant had nothing to do with the betting, and, moreover, it is necessary that it should be done knowingly and wilfully.

[BLACKBURN, J. By s. 3 it is made an offence in the owner or occupier to permit the place to be kept or *used* for the purpose of betting. It must be taken on the statement of the case that the appellant was well aware of what was going on.]

"To be used," means to be habitually used.

[BLACKBURN, J. If that is necessary, I should say, on the facts of the case, that the appellant did permit the place to be habitually used.]

Secondly, this is not a place within the meaning of the Act. The preamble shews that betting houses were alone aimed at, and "place" must be ejusdem generis with the things that have gone before, viz. a house, office, or room; "place" must therefore be a covered place: *Doggett* v. *Catterns*. (1) *Eastwood* v. *Miller* (2) will be relied on by the other side; but it is distinguishable.

J. C. Barker, for the respondents. In *Doggett* v. *Catterns* (1) it was agreed that the spot under a tree in Hyde Park would have been a "place" within the Act, notwithstanding it was an open place; and the only reason that the Exchequer Chamber held it was not a place was because the defendant, who had no right whatever there, could not be said to be owner or occupier. *Bows* v. *Fenwick* (3) and *Eastwood* v. *Miller* (2) are direct authorities that this is a "place." The latter case is precisely similar in its circumstances to the present case, and is an authority that the appellant, by allowing Trickett and the other professional bettors to make bets, was permitting the place to be used for betting within the meaning of the Act.

(1) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 46, 159.

(2) Law Rep. 9 Q. B. 440.

(3) Law Rep. 9 C. P. 339.

10 Jur. N.S. 1238, Mich. 243.

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BLACKBURN, J. I think that this conviction must be affirmed. The legislature in passing the Act of 16 & 17 Vict. c. 119, shew the danger they intended to guard against by the recital. Then s. 1 provides—[the learned judge read the section]. In the first part the place is mentioned, "house, office, room, or other place;" and the second part points to the manner of betting, viz. by the receipt of money on deposit. On this my Brother Brett in *Bows* v. *Fenwick* (1) remarks: "When the Act of Parliament in question passed, the legislature had not made up its mind to prohibit gaming altogether. But what it did mean to prohibit was that which is described in the preamble, viz. a kind of gaming which had of late sprung up, tending to the injury and demoralisation of improvident persons, 'by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse racing and the like contingencies.' That discloses the kind of gaming which was sought to be suppressed. The enacting part of s. 1 then provides that 'no house, office, room, or other place, shall be opened, kept, or used' for the purposes mentioned in the preamble. And then s. 3 enacts that 'any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or any of them,' shall, on summary conviction, be liable to a penalty. It would seem, therefore, that the kind of gaming prohibited is the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto,—a fixed place to which all persons may resort." On this I would observe, that while it is quite plain that the latter part of s. 1 is confined to the kind of betting mentioned in the preamble, I think it is not so clear that the first part of the section may not extend further. But in the present case it is sufficient to say that it is clear the gambling was within the section, as a gambling by receiving

(1) Law Rep. 9 C. P. at p. 345.

money on deposit. Money was deposited in *Bows* v. *Fenwick* (1) and also in *Eastwood* v. *Miller* (2), though that fact is not referred to in the judgments of the Court; and it may well be that it was intended to confine the enactment to that kind of betting, leaving it to future legislation to extend the enactment further if thought to be advantageous. It is, however, as I have said, unnecessary to decide the point in the present case. What we have to determine is, first, was this "a place" within the Act? It was completely under the control of the appellant, just as much as an ordinary skittle-ground is; and it is immaterial that it was not covered over. In *Doggett* v. *Catterns* (3) the place where the betting was carried on was clearly not "a place" kept for betting or which the occupier allowed to be used for betting, because the ranger was the person who had the control of the park, and he was no party to the betting. Here the appellant had the complete control of the place, and received 6*d.* for the admission of each person. The circumstances under which the betting was carried on are detailed in the case. It is not expressly stated, but no doubt the meaning is that the persons receiving the shilling bet the odds, and paid in shillings if they lost and the person depositing the shilling won. On the rest of the statement it is clear that the magistrate came to the conclusion that the appellant knew that people resorted to the inclosure for the purpose of thus betting, and permitted foot-racing to go on and these betting men to come in, knowing the betting to be the ordinary consequence. The magistrate was therefore right in saying the appellant did permit the place to be used for betting; on the principle that a man must be taken impliedly to be answerable for what he knows to be the ordinary consequence of what he expressly permits. On this principle, in the old case of *Rex* v. *Moore* (4), a man was held liable for a nuisance arising from the noise and disturbance caused by people assembling outside the premises to shoot the pigeons which escaped being shot in the premises in which he allowed pigeon matches to be shot. Then is it any answer that, although the appellant thus permits betting,

(1) Law Rep. 9 C. P. 339.
(2) Law Rep. 9 Q. B. 440.
(3) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159.
(4) 3 B. & Ad. 184.

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the premises are primarily used for another purpose, viz., foot-racing? The appellant keeps them for both purposes; and it is immaterial which purpose is ancillary to the other. That cannot affect the offence. Then it was said that the place was not shewn to have been "habitually" used for betting; the word does not occur in the statute; but I think, if it were necessary to shew it, there was ample evidence from which the conclusion might be drawn, that it was habitually used. And, moreover, I am of opinion, though the magistrate would not probably have found that the place was "used" for betting, if only one instance of betting had been proved, still if the occupier of the place, knowing that betting was going on in this way, although only once, allowed it to be carried on, he would be guilty of permitting the place to be used for betting, and would be within the statute. I repeat that I do not express any opinion whether the Act is restricted to cases in which the betting is carried on by means of money actually deposited. That may be a question of some nicety.

For the reasons I have given, I think this conviction must be affirmed.

MELLOR, J. I am of the same opinion. I do not think any authority is wanted; but I entirely agree with what is said by my Brothers Lush and Archibald in *Eastwood* v. *Miller*. (1) The case there was scarcely as strong as the present in favour of a conviction. In that case only a single instance of betting was proved, but I entirely agree with the judgments there, and with what has been said by my Brother Blackburn about "habitual." Whether the place was used for the purpose of betting was for the magistrate; but his finding as to whether the appellant knowingly and wilfully permitted the place to be used for betting no doubt might be influenced by the fact of whether the user was shewn to have been habitual or not. But here nothing can be clearer than that the appellant was fully cognisant of what the professional bettors were doing. I express no opinion whatever as to whether the betting, to be within the Act, must be by way of deposit. As to this not being a "place," I think that point quite unarguable. I concurred, in the Exchequer Chamber, in the judg-

(1) Law Rep. 9 Q. B. 440.

ment in *Doggett* v. *Catterns* (1); but the facts of this case are entirely distinguishable, and meet the objection urged in that case. Here is a house and premises, with cricket-ground attached, which is inclosed, and is entirely under the appellant's control. As to the argument of ejusdem generis, in applying that doctrine, we must first look at the object of the Act, and we must also bear in mind that every word in succession in this enactment is larger in its meaning than the preceding word, until at last we come to "other place:" so that assuming the rule of construction as to ejusdem generis to be applicable, we are not bound by the strict rule or to give any narrow interpretation to the word "place." I therefore concur that the conviction must be affirmed.

LUSH, J. I am of the same opinion. I have given a great deal of consideration to the statute since the case of *Eastwood* v. *Miller* (2), and the result is, that I am convinced that my Brother Archibald and I were right in the view we took, and that this user is within the Act. The preamble is in these words—[the learned judge read the preamble]. It seems clear from this that the legislature had no intention of interfering with the ordinary practice of betting and wagering; that had been dealt with in a previous Act (8 & 9 Vict. c. 109), by which ordinary betting was treated as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal. The present statute was intended to deal with a more degenerate form of gambling and one of a more demoralising character. The words of the enacting part go beyond the words of the preamble, not for the purpose of extending the operation of the Act, but for the better carrying out the object intended, and reaching every kind of evasion which might otherwise have been attempted. Therefore words are inserted to amplify the bare statement of principle. Thus, in the preamble, "houses and offices" only are mentioned; and it would have been easy to evade the Act if the enacting part had not amplified this expression; consequently the Act goes on in the enacting part with "room or other place," which would include any kind of inclosure

(1) 19 C. B. (N.S.) 765; 34 L. J. (C.P.) 159. (2) Law Rep. 9 Q. B. 440.

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whether covered in or not. It is not so much the kind of place as the kind of betting carried on which the statute is aiming at. The character of the place is comparatively unimportant. Again, the preamble mentions only the receipt of money by owners or occupiers of such houses or offices, or by other persons acting on their behalf. This might be easily evaded; consequently the enacting part mentions not only those classes of persons, but also "any person using the same;" and it forbids any house, office, room, or place to be opened, kept, or used for the purpose of the owner, occupier, keeper, or any person using the same, or any person on behalf of such persons, betting with other persons resorting thereto; and then in s. 3 a penalty is imposed on any person who shall "knowingly and wilfully permit the place to be opened, kept, or used by any other person for the purposes aforesaid," that is, of making bets. It also speaks of any person having the management of the business. The object, therefore, is to suppress this particular kind of gambling altogether; and we must construe the Act so as to carry out that object as far as possible, but at the same time not strain the language so as to embrace cases which are not within the operation. It seems to me that the facts of the present case bring it within the very letter as well as the spirit of the Act. I need not go through the facts, as they have already been thoroughly examined by my learned Brothers.

Judgment for the respondents.

Attorneys for appellant: *Doyle & Edwards, for Binney & Sons, Sheffield.*

Attorneys for respondents: *R. & W. B. Smith, for Yeomans, Sheffield.*

END OF MICHAELMAS TERM, 1874.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXVIII VICTORIA.

Applied. BAILEY *v.* BULLOCK. [1950] 2 All E.R. 1167.

HOBBS AND WIFE *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. 1875 *Jan.* 15.

Carrier of Passengers—Railway Company—Breach of Contract of Carriage—Measure of Damages.

The plaintiff, with his wife, and two children of five and seven years old respectively, took tickets on the defendants' railway from Wimbledon to Hampton Court, by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night the plaintiff was unable to get a conveyance or accommodation at an inn. And the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance.

In an action to recover damages for the breach of contract, the jury gave 28*l.* damages: viz. 8*l.* for the inconvenience suffered by having to walk home; and 20*l.* for the wife's illness and its consequences:—

Held, as to the 8*l.*, that the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the 20*l.*, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it.

FIRST count, by Samuel Hobbs and Elizabeth his wife, that the plaintiff Elizabeth became a passenger in one of defendants' car-

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riages to be by them carried from Wimbledon to Hampton Court by a train which defendants represented was about to proceed to Hampton Court, and it thereupon became the duty of defendants to carry her thither, but they carried her in another direction, viz. to Esher station, far distant from Hampton Court station, and there left her, whereby the plaintiff Elizabeth was prevented reaching her home for a long time and put to and suffered great exposure, inconvenience, and fatigue, and suffered much in mind and body, and has been unable to attend to domestic affairs, and business, and to her children. Claim, 300*l.*

Second count, that Samuel Hobbs lost and was deprived of the comfort and services of his wife, and was put to great expense in nursing and medical attendance on his wife by reason of the premises in the first count mentioned. Claim, 100*l.* (1)

Plea: payment of 2*l.* into court.

Replication: damages ultra. Issue joined.

At the trial, before Kelly, C.B., at the Kingston spring assizes, 1874, it appeared in evidence that the plaintiff lived at New Hampton. On the 12th of August, he took second-class tickets for himself, his wife, and two children of five and seven years old respectively, at the Wimbledon station on the defendants' railway to Hampton Court station, by the midnight train. They took their places in the train, but it turned out that the train went on the other branch; and the plaintiff's party were therefore obliged to get out at Esher station, which was between four and five miles from the plaintiff's house, and further from it than the Hampton Court station is by two or three miles. The plaintiff was unable to get a conveyance or accommodation at an inn, where he knocked in vain. The party were, therefore, obliged to walk home, where they arrived at about three in the morning. It was a drizzling wet night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance.

In answer to questions by the Chief Baron, the jury found 8*l.* as damages for the inconvenience suffered by the plaintiffs in being obliged to walk home; and 20*l.* in respect of the wife's illness and

(1) The precise form of the two counts appears to have escaped notice.

its consequences; a verdict accordingly passed for the plaintiffs for 28*l.* beyond the 2*l.* paid into court, leave being reserved to move to reduce the verdict by the 8*l.* and 20*l.*, or either, if the Court should be of opinion that the plaintiffs were not entitled to both or either of those sums.

A rule having been obtained accordingly,

Jan. 14. *Day, Q.C.*, and *G. Shaw*, shewed cause. The plaintiffs are entitled to recover damages under the two heads. First, for the inconvenience caused by having to walk a distance of five miles from the place where the defendants had wrongfully carried them to Hampton. These damages are the direct consequence of the breach of the defendants' contract, and in calculating them the jury ought to take into their consideration all the surrounding circumstances, the lateness of the hour, and the state of the weather. The case of *Hamlin* v. *Great Northern Ry. Co.* (1) is distinguishable; there the damages claimed were in respect of the plaintiff being unable to keep certain appointments which he had made with his customers of which the defendants had no notice, and such damages were held not recoverable within the rule laid down in *Hadley* v. *Baxendale.* (2) So the hotel expenses of a commercial traveller waiting for goods which the defendants ought to have delivered were held not to be reasonably within the contemplation of the parties at the time the contract was made, and therefore not recoverable: *Woodger* v. *Great Western Ry. Co.* (3) But in the present case the damages are the natural consequence of the defendants' wrongful act. The argument on the other side must go the length, that because there is no pecuniary damage the defendants are to go free. Secondly, the plaintiffs are entitled to recover damages in consequence of the illness to the wife occasioned by the walk to Hampton. Catching cold is the natural consequence of having been left at the station and walking home in the wet; natural consequence does not mean inevitable consequence; but the walk and its result, the illness, all flowed as the natural consequences of the breach of the defendants' contract. They are the injuries caused by the defendants' conduct to the person they

(1) 1 H. & N. 408; 26 L. J. (Ex.) 20. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) Law Rep. 2 C. P. 318.

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engaged to carry, and the damages are therefore not too remote. In *Davis* v. *Garrett* (1) the defendant contracted to carry in his barge the plaintiff's lime, the master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire, the whole was lost; in *Lee* v. *Riley* (2) the defendant's horse strayed into a field belonging to the plaintiff through the defect of a fence which the defendant was bound to repair, and kicked the plaintiff's horse; in *Powell* v. *Salisbury* (3), the plaintiff's horses escaped into the defendant's close and were killed by the falling of a haystack; in *Lawrence* v. *Jenkins* (4), the plaintiff's cows strayed through the gap of a fence into the defendant's close, and fed on the leaves of a yew tree, and died in consequence; and in all those cases the Court considered that the plaintiff could recover, the damages not being too remote. *Sneesby* v. *Lancashire and Yorkshire Ry. Co.* (5), *Hill* v. *New River Co.* (6), *Mullett* v. *Mason* (7), and *Greenland* v. *Chaplin* (8), are also cases in which it has been held that the damages sustained by the plaintiff were not too remote.

Jan. 15. *Parry, Serjt.*, and *C. W. Wood, Q.C.*, in support of the rule. Had the plaintiff taken a conveyance, undoubtedly he would have been entitled to claim the cost from the defendants; but the 2*l.* paid into court is ample to cover that. Discomfort or inconvenience cannot be measured by pecuniary damages, and the plaintiffs are therefore not entitled to the 8*l.* under this head. In *Hamlin* v. *Great Northern Ry. Co.* (9), Pollock, C.B., says: "In actions for breaches of contract, the damages must be such as are capable of being appreciated or estimated. . . . The plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions

(1) 6 Bing. 716.
(2) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
(3) 2 Y. & J. 391.
(4) Law Rep. 8 Q. B. 274.
(5) Law Rep. 9 Q. B. 263.
(6) 9 B. & S. 303.
(7) Law Rep. 1 C. P. 559.
(8) 5 Ex. 243; 19 L. J. (Ex.) 293.
(9) 1 H. & N. at p. 411.

upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract." Secondly, as to the 20*l.* given as damages for the wife's illness and its consequence, that is clearly too remote: *Woodger* v. *Great Western Ry. Co.* (1) and *Burton* v. *Pinkerton* (2); see also the judgment of Willes, J., in *Fletcher* v. *Tayleur*. (3)

COCKBURN, C.J. We are of opinion that this rule should be made absolute as regards the 20*l.* damages given in respect of the consequences of the wife having caught cold in this walk from Esher to Hampton; but that it should be discharged as regards the 8*l.* in respect to the personal inconvenience suffered by the husband and the wife in consequence of their not being taken to, or put down at their proper place of destination.

The facts are simple. The plaintiffs took tickets to be conveyed from the Wimbledon station of the defendants' railway to Hampton Court. It so happened that the train did not go to Hampton Court, and the plaintiffs were taken on to Esher Station, which increased the distance which they would have to go from the railway station to their home by two or three miles.

Damages were asked for upon two grounds: first, for the inconvenience that the husband and wife, with their two children, sustained by having to go this distance, the night happening to be a wet night; in the second place, damages were asked by reason of the wife, from her exposure to the wet on that night, getting a bad cold and being ill in health, the consequence of which was that some expense was incurred in medical attendance upon her. We think these two heads of damage must be kept distinct, and I propose to deal with them as distinct subjects.

With regard to the first, there can be no doubt whatever upon the facts that the plaintiffs were put to personal inconvenience: they had to walk late at night, after 12 o'clock, a considerable distance, the wife suffered fatigue from it, and they had to carry their children, or to get them along with great difficulty, the

(1) Law Rep. 2 C. P. 318. (2) Law Rep. 2 Ex. 340.
(3) 17 C. B. at p. 29.

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children being fatigued and exhausted; and there is no doubt that there was personal inconvenience suffered by the party on that occasion, and that inconvenience was the immediate consequence and result of the breach of contract on the part of the defendants. The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do; they tried to get a conveyance; they were informed none was to be had; and they had no alternative but to walk; and therefore it was from no default on their part, and it cannot be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendants' contract to convey them to Hampton Court. Now inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavoured to be argued, upon principle and upon authority, that this was a kind of damage which could not be supported; and attempts were also made to satisfy us that this supposed inconvenience was more or less imaginary, and would depend upon the strength and constitution of the parties, and various other circumstances; and that it is not to be taken that a walk of so many additional miles would be a thing that a person would dislike or suffer inconvenience from; and that there may be circumstances under which a walk of several miles, so far from being matter of inconvenience, would be just the contrary. All that depends on the actual facts of each individual case; and if the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of the contract, I can see no reasonable principle why that should not be compensated for. The case of *Hamlin* v. *Great Northern Ry. Co.* (1) was cited as an authority to shew that for personal inconvenience damages ought not to be awarded. That case appears to me to fall far short of any such proposition. It merely seems to amount to this: that where a party, by not being able to get to a place which he would otherwise have arrived at in time to meet persons with whom he had appointments, had sustained

(1) 1 H. & N. 408; 26 L. J. (Ex.) 20.

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pecuniary loss, that is too remote to be made the subject of damages in an action upon a breach of contract. That may be perfectly true, because, as in every one of the instances cited, you would have to go into the question whether there was a loss arising from the breach of contract, before you could assess that loss. And, after all, if the true principle be laid down in *Hadley* v. *Baxendale* (1), the damage must be something which is in the contemplation of the parties as likely to result from a breach of contract; and it is impossible that a company who undertake to carry a passenger to a place of destination can have in their minds all the circumstances which may result from the passenger being detained on the journey. As far as the case of *Hamlin* v. *Great Northern Ry. Co.* (2) goes, I am far from saying it was a wrong decision; but it did not decide that personal inconvenience, however serious, was not to be taken into account as a subject-matter of damage in a breach of contract of a carrier to convey a person to a particular destination. If it did, I should not follow that authority; but I do not think it applicable to this case at all. I think there is no authority that personal inconvenience, where it is sufficiently serious, should not be the subject of damages to be recovered in an action of this kind. Therefore, on the first head, the 8*l.*, I think the verdict ought to stand.

With regard to the second head of damage, the case assumes a very different aspect. I see very great difficulty indeed in coming to any other conclusion than that the 20*l.* is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my Brother Blackburn in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes inter-

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. (2) 1 H. & N. 408; 26 L. J. (Ex.) 20.

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vening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. As my Brother Blackburn points out, so far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because, if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there, he may take those means and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the damage resulting must be admitted to be fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it; and if in such a case the party recovered damages by reason of the cold caught incidentally on that foot journey, it would be necessary, on the principle so applied, to hold that in the two cases which have been put in the course of the discussion, the party aggrieved would be equally entitled to recover. And yet the

moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: Suppose in walking home, on a dark night, the plaintiff made a false step and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that that is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or indeed a great many more times, from Esher to Hampton without falling down and breaking a limb; therefore it could not be contended that that could have been anticipated as the likely and the probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of those causes, it might be said: "If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage." In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences. Therefore, as regards the damages awarded in respect of the wife's cold, the rule must be made absolute to reduce the damages by that amount.

BLACKBURN, J. I am of the same opinion. I think the rule should be made absolute to reduce the damages to 8*l.* beyond the 2*l.* paid into court, but should not be made absolute any further. The action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract. It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher, instead of

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Hampton Court. The contract was to supply a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. It was urged, upon the authority of *Hamlin* v. *Great Northern Ry. Co.* (1), that that did not apply to the present case, and it was contended that,—though, when the plaintiff was at Esher, if he had been able to hire a fly or obtain a carriage and paid money for it, it was admitted he could recover that money,—yet inasmuch as he could get no carriage, and was compelled to walk under penalty of staying where he was all night, he was not entitled to get anything; and *Hamlin* v. *Great Northern Ry. Co.* (1) was cited as an authority for that. Now, as I have said, what the passenger is entitled to recover is the difference between what he ought to have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that which the learned judge gave to the jury here, namely, that the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage. Taking that view they were certainly entitled to recover for that, and if it had been left to me, I am not sure whether or not I should have given 8*l.* more than the 2*l.* paid into court; but that is not the question for us. The question for us is whether the plaintiffs are entitled to recover anything. I am of opinion that they are. In *Hamlin* v. *Great Northern Ry. Co.* (1) there was no inconvenience at all. The plaintiff was going to Hull; he was obliged to stop at Grimsby for the night, and went on to Hull the next day. What he sought in the action was to recover damages for the loss of his appointments which he had with customers. That was held to be too remote, and it was held he was only entitled to 5*s.*, though I must say I do not know how that amount was arrived at. The inconvenience he did suffer in sleeping at Grimsby instead of Hull seems really

(1) 1 H. & N. 408; 26 L. J. (Ex.) 20.

to be nothing, and there was no substantial ground on which he could have recovered. I do not understand from the ruling of the judges in that case that they held that nothing can be recovered except where there has been money disbursed; if the case decided any such thing, I think the case of *Burton* v. *Pinkerton* (1) would be precisely the other way; for there the plaintiff was left at Rio, and all the members of the Court thought he was entitled to something for the inconvenience of being left there; the point on which they differed was whether a jury could take into consideration the claim for damages for being imprisoned there; and the majority of the Court thought they could not. Therefore, on the first head of damages in this case, I do not see that we can cut down the damages below what the jury have found.

Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is; I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract

(1) Law Rep. 2 Ex. 340.

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is the same, a contract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this,—suppose you expand the declaration and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground, whereby I became ill and sick. That is a clear and immediate consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because it was a cold and wet night, I caught cold, and I became ill. When it is put in that way, there are many causes or stages which there are not in the other.

With regard to the two instances my Lord put,—one, of the passenger, when walking home in the dark, stumbling and breaking his leg, the other, of his hiring a carriage, and the carriage breaking down,—I must say I think they are on the remote side of the line, and further from it than the present case. I do not think it is any one's fault that it cannot be put more definitely; I think it must be left as vague as ever, as to where the line must be drawn; but I think in each case the Court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not.

I think, therefore, the rule ought to be made absolute to reduce the damages to the 8*l.* beyond the 2*l.*

MELLOR, J. I am entirely of the same opinion. I quite agree with my Brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I must

say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed, by reason of the breach of contract of the carriers, at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home and charge the expense to the defendants. The reason why you may hire a carriage and charge the expense to the company is with the view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience.

With regard to the other point, I confess I should have felt great alarm if we had been driven to say that the damages resulting from the cold caught by the wife upon the occasion in question ought to have been taken into consideration by the jury. I should have felt alarm at the extent to which that might be applied. Therefore I think it is necessary to see whether there is a rule applicable to such a case, so that we can divide the damages by the measure of inconvenience suffered on the one side, and by the fact that they are too remote on the other. Now, what Wilde, B. said, in the case of *Gee* v. *Lancashire and Yorkshire Ry. Co.* (1) is, I am disposed to think, as far as it goes, the rule applicable to the present case. He says: "The damage, which as a matter of law must be considered as the measure of damages, is such as arises naturally," —I would qualify that by adding the words "and directly," and with that qualification I think it is strictly applicable,—"such as arises naturally and directly from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract." In this case it so happened accidentally that the night in question was a wet night, and the inconvenience sustained was greater than it would have been on any other night. That is an accident, and the catching cold is an accident. You might just as well say that, if, in the walk home, the plaintiff's wife had put her foot into a pool of water, and she had neglected when she got home to prevent the common result of that, namely, catching cold, the company are to be liable. To say that what accidentally arises, although

(1) 6 H. & N. at p. 220; 30 L. J. (Ex.) 11.

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arising from the particular breach of contract or the particular cause, is always to be recoverable as a measure of damages, would be to lay down a very dangerous rule. My Lord and my Brother Blackburn have said that we cannot lay down a rule as applicable to all cases, and Wilde, B., says, when the matter came to be further considered, it would turn out the rule as to the measure of legal damages was not applicable in all cases. There might be circumstances which would take it out of the strict rule laid down in *Hadley* v. *Baxendale* (1), and leave it as a matter of some uncertainty.

In this case I come to the same conclusion as my Lord and my Brother Blackburn, that the rule must be made absolute to reduce the damages to the 8*l.* beyond the 2*l.* paid into court.

ARCHIBALD, J. I am of the same opinion. I concur in the observations which have been made by my Lord and my learned Brothers, and I would only add, without expressing anything in the form of a rule, that in case of breach of contract, the party breaking the contract must he held liable for the proximate and probable consequences of such breach, that is, such as might have been fairly in the contemplation of the parties at the time the contract was entered into. Therefore, as to the first head of damage, the inconvenience of walking to Hampton, I think there can be no doubt that is such an inconvenience as the parties must have contemplated would arise from the breach of the contract; and that, as it appears to me, is an inconvenience capable of being estimated in a pecuniary way. It is admitted, if there had been means of conveyance and the plaintiffs had availed themselves of those means of conveyance, they would have been entitled to a measure of damages for that expense. I think there is no difficulty in applying to the inconvenience which has been suffered a pecuniary measure of damages. The case is not one of mere vexation, but it is one of physical inconvenience, which can in a sense be measured by money value, and the parties here had the fair measure of that inconvenience in the damages given by the jury.

With regard to the other head, I agree in the opinion already expressed by my Lord and my learned Brothers, that that is too

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

remote. That does not fall within the same category. With regard to what might be the result of the walk home, the wet night, the condition of health, the state of the plaintiff herself, all those things could not have been in the contemplation of the parties when they made the contract. I think, therefore, that this does fall beyond the line. Without saying anything further, I think it is too remote. The rule must therefore be made absolute to reduce the verdict to 8*l.* beyond the 2*l.*

Rule accordingly.

Attorneys for plaintiffs: *Guillaume & Sons.*
Attorney for defendants: *L. Crombie.*

SMITH, EXECUTRIX OF J. G. SMITH, *v.* STEELE AND OTHERS. *Jan.* 25.

Negligence—Master and Servant—Compulsory Pilotage—Injury to Pilot.

There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and an action will lie by the pilot against the shipowners for injuries, caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants.

9 Q B D 303
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DECLARATION by the plaintiff, as executrix of J. G. Smith, deceased, that the defendants were possessed of a certain sailing vessel and of a certain boat slung upon the same, which sailing vessel and boat were then under the care and management of certain servants of the defendants, and that J. G. Smith then was, by the consent and invitation of the defendants, and by virtue of their retainer, upon the sailing vessel, for the purpose of piloting the same down the River Thames. Nevertheless, the defendants, by their servants, so carelessly, negligently, and improperly slung, suspended, and managed the boat, that, through their carelessness, negligence, and unskilful conduct, whilst J. G. Smith was upon the vessel under the circumstances and for the purpose aforesaid, the boat fell upon J. G. Smith and injured him, insomuch that he in a few days afterwards died, &c.

Pleas, 1. Not guilty; 2. That J. G. Smith was on board the

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vessel in the defendants' employment as pilot, for the purpose of piloting the vessel down the River Thames, for which he was so retained for reward payable to him, and the injury to J. G. Smith was not in any way occasioned by any act, neglect, or default of the defendants personally, but was solely occasioned by the negligence of the servants of the defendants, and the servants of the defendants were persons of reasonable skill and care, and reasonably competent to sling, suspend, and manage the boat; and the servants of the defendants and J. G. Smith were engaged in one common employment with a common object, to wit, in the navigation and management of the vessel, and the injury to J. G. Smith was one of the risks incident to the employment of J. G. Smith as such pilot; and that the alleged carelessness, negligence, unskilful and improper conduct of the servants of the defendants were wholly unauthorized by the defendants.

Issue thereon.

At the trial before Lush, J., at the Sussex spring assizes, 1874, the facts stated in the judgment of the Court were proved, and the jury found a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, or a nonsuit.

A rule was afterwards obtained accordingly, on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence.

Jan. 12. *Willis* shewed cause.

Thesiger, Q.C., and *Wood Hill*, in support of the rule.

In addition to the cases mentioned in the judgment of the Court, the following were cited: *Degg* v. *Midland Ry. Co.* (1); *General Steam Navigation Co.* v. *British and Colonial Navigation Co.* (2)

Cur. adv. vult.

Jan. 25. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

BLACKBURN, J. (3) This was an action under Lord Campbell's

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171. (2) Law Rep. 4 Ex. 238.
(3) The judgment was read by Mellor, J.

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171.

Act to recover damages in respect of the death of the plaintiff's testator, who was her husband.

At the trial before my Brother Lush the following facts were proved:—The defendants were the owners of a vessel lying in dock, about to proceed on a voyage in which the employment of a pilot was compulsory. The testator was a pilot who was engaged for that voyage. He (in compliance with what it was proved was always the practice of pilots) went on board the vessel in dock to give directions to the crew when getting the vessel out of dock. Whilst doing so a boat, which had been negligently slung, fell on him and killed him. The defendants did not personally interfere in the matter. From the way the case comes before us on a point reserved, we must take it as a fact that the accident was occasioned by the negligence of the servants of the defendants in slinging the boat without contributory negligence on the part of the deceased. Leave was reserved to enter the verdict for the defendants or a nonsuit on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence. A rule nisi was obtained accordingly, against which cause was shewn in this term before my Lord Chief Justice, my Brothers Mellor, Lush, and myself, when the case was very ably argued by Mr. Willis for the plaintiff, and by Mr. Thesiger and Mr. Wood Hill in support of the rule, and the Court took time to consider its judgment.

The law is, to a certain extent, determined by the case of *Indermaur* v. *Dames*. (1) There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who, at his invitation, express or implied, come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. And that obligation extends to the workmen sent by a tradesman to repair part of the machinery. Mr. Justice Willes, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no such obligation to a servant, proceeds to give the reason of the judgment in these terms: "The class to which the customer belongs includes persons who go, not

(1) Law Rep. 1 C. P. 274, affirmed in error, Law Rep. 2 C. P. 311.

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as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation express or implied." In *Morgan* v. *Vale of Neath Ry. Co.* (1), which was earlier in date than *Indermaur* v. *Dames* (2), the reason why a servant cannot sue his master for negligence of a fellow servant was put on the ground, that it was an implied part of the contract between master and servant that the servant should, as between them, take upon himself such risks. In the more recent case of *Wilson* v. *Merry* (3) the House of Lords, in a Scotch case, decided that the owners of a colliery were not responsible to their servants for an injury occasioned by the negligence of the general superintendent of the mine, to whom the defendants had delegated their whole power and authority. It does not appear from the report that the cases of *Morgan* v. *Vale of Neath* (1) and *Indermaur* v. *Dames* (2) were brought to their Lordships' notice, but the Lord Chancellor (Lord Cairns) seems to us to have arrived by independent reasoning at the principle, that the exemption from liability was from the contract between the master and his servant, and to base his judgment upon it. He says: "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with the business. . . . . At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business." (4)

In the present case the accident happened before the actual commencement of the voyage, but it is clear that the deceased was on board only because he was going on that voyage as a pilot, and under the same terms as to risk as if the voyage had begun. We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and the pilot whom

16 Jur N S 1074

12 Jur N S 432

(1) 5 B. & S. 570; 33 L. J. (Q.B.) 260; affirmed in error Law Rep. 1 Q. B. 149.

(2) Law Rep. 1 C. P. 274, affirmed in error Law Rep. 2 C. P. 311.

(3) Law Rep. 1 H. L., Sc. 326.

(4) Law Rep. 1 H. L., Sc. at p. 332.

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they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants. *Indermaur* v. *Dames* (1) decides that there is no such implied contract between the owner of machinery and those who are sent by their masters to repair it. And we think that there is no such implied contract in the case of a pilot. The law as to pilots is now regulated by the Merchant Shipping Acts. The pilot is, by 17 & 18 Vict. c. 104, s. 365, subject to a penalty if he refuses to take charge of the ship. The master is, by s. 353, bound under a penalty to employ the pilot. The rate of remuneration is, by s. 358, neither to be more nor less than the fixed rate, though both parties should agree. And by s. 388 the owner is not to be liable for the pilot as his servant. By a subsequent enactment, 35 & 36 Vict. c. 73, s. 9, power is given by bye-laws to modify s. 358 so far as to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord Cairns points out, (at least theoretically) the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk.

We therefore think that the rule should be discharged.

Rule discharged.

Attorney for plaintiff: *G. Hebbell.*

Attorneys for defendants: *Edwards, Layton, & Jaques.*

(1) Law Rep. 1 C. P. 274; affirmed in error, Law Rep. 2 C. P. 311.

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Jan. 26.

DIXON *v.* THE LONDON SMALL ARMS COMPANY (LIMITED).

Patent—Infringement—Rights of the Crown.

The plaintiff was the assignee of several letters patent for "Improvements in breach-loading firearms." The defendants, under a contract with the secretary of state for war, manufactured and delivered, according to the terms of the contract, certain rifles (which were accepted from the defendants by the secretary at war for the public service), and in so doing infringed the plaintiff's patent:—

Held, that, the contract being for the sale of articles for the defendants' own profit, and not as manufacturers of them as servants of the Crown, the principle laid down in *Feather* v. *The Queen* (6 B. & S. 257; 35 L. J. (Q. B.) 200) did not apply, and the defendants were liable for the infringement.

CASE stated by an arbitrator.

This is an action brought by the plaintiff to recover damages from the defendants, for the alleged infringement of the several letters patent and patent rights mentioned in the declaration.

1. The plaintiff is the managing director of the National Arms and Ammunition Company (Limited), a manufacturing and trading company, established on the 23rd day of January, 1872, under the Joint Stock Companies Acts, 1862 and 1867, with limited liability, for the manufacture and sale of small-arms, and amongst others, for the manufacture of certain rifles known as the Martini-Henry rifles, and the plaintiff alleges that he is the assignee of the several letters patent and patent rights therein and thereby granted, mentioned in the first five counts of the declaration, and that he is duly registered as the proprietor thereof, pursuant to the statutes.

2. The defendants are the London Small-Arms Company (Limited), a manufacturing and trading company, established on the 10th of September, 1866, under the Joint Stock Companies Acts, 1862 and 1867, with limited liability, for the manufacture and sale of small-arms to the public, and carrying on their business at Victoria Park Mills, Old Ford, in the county of Middlesex.

4. For the purpose of the case the defendants admit the validity of the letters patent and the title of the plaintiff under the several assignments.

5. The acts complained of as infringements are as follows:—On the 16th of April, 1872, the defendants tendered to the secretary of state for war for the supply, for the public service,

of 13,875 Martini-Henry rifles, and on the 29th of April, 1872, the tender was accepted by the secretary of state, and a contract was entered into at the price and on the terms mentioned in it.

The tender contained the following clause :—"We, the undersigned, do hereby agree and bind ourselves to provide and deliver the articles enumerated in the list or schedule hereunto annexed, to which we have affixed prices, within the period specified in the schedule, and we do hereby agree to abide by and fulfil all the terms and conditions above mentioned, and in default thereof to forfeit and pay to Her Majesty, her heirs and successors, such penalties or sums as are mentioned." This document was dated the 16th of April, 1872, and signed by the managing director on behalf of the defendants. Annexed to this document, and dated the 29th of February, 1872, was a paper containing, amongst others, the following terms :—"That the price of the arm shall be liable to readjustment in the event of the substitution of a cheaper material being sanctioned for the manufacture of certain parts. That the companies shall be protected by this department against the patentees in the manufacture of the arms to be contracted for." (1)

6. The defendants under and in performance of the contract, manufactured and delivered, according to the terms stated in the contract, a portion of the 13,875 Martini-Henry rifles, which rifles were accepted from the defendants by the secretary of state for war, for the use of Her Majesty and the public service, and the defendants have been paid for a part of the rifles.

For the purpose of this case, the defendants agree that the rifles so manufactured for and accepted by the secretary of state, under the contract, would, but for the fact that they were manufactured and delivered to the secretary of state for the public service and use of Her Majesty, and under the said contract, have been infringements of the letters patent.

7. Up to the time when the question in what respect the rights of the Crown are affected by the grant of letters patent for inven-

(1) It was contended by the plaintiff that this paper, being prior in date to the contract signed by the defendants, formed no part of the contract, but the Court allowed the argument to proceed on the assumption that it did form part of the contract, the Court deeming it immaterial whether it did or did not.

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tions was raised in the cases of *Clare* v. *The Queen* (1) and *Feather* v. *The Queen* (2), it had been the practice in many cases where patented inventions were used for the public service in any of the government departments, for the patentees, who were in most instances the inventors, to be remunerated by or by direction of the ministers or officers of the Crown administering such departments, and licences were granted to and taken by the said ministers or officers of the Crown, which licences in many cases were granted on terms that, even where the patented articles were made in the government establishments, royalties should be paid thereon in the same way as though the use had been by private individuals. On several occasions, the Attorney General, appearing for the Crown, on an application for the prolongation of a patent, before the Judicial Committee of the Privy Council, has applied to the Committee for the insertion in the renewed patent of a condition that the Crown should have the right to use the invention without payment of any royalty, which application has been in some instances refused by the said Judicial Committee.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover against the defendants for infringement of the patents.

Sir W. V. Harcourt, Q.C. (*Aston, Q.C.*, and *Macrory* with him), for the plaintiff. The question is, whether, in an action for the infringement of a patent, it is any answer to say that the defendants entered into a contract with the Crown to manufacture and deliver certain articles, and that in carrying out that contract they infringed the plaintiff's patent. This is an attempt to extend the principles laid down in *Feather* v. *The Queen*. (2) In that case the question arose between the patentee and the Crown; here the Crown is not a party on the record. This is an action by one subject against another for the infringement of a right which has been conferred upon him by the Crown. It was no doubt decided in *Feather* v. *The Queen* (2) that the Crown has the privilege of using a patent right which it has granted to a subject without the payment of any royalty, but it does not follow that anybody else can assume that privilege and clothe himself with the rights which

(1) Not reported. (2) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

belong to the Crown. The defendants are contractors supplying certain articles for the use of the Crown. They are not in the position of the servants of the Crown manufacturing articles for the Crown in the workshops of the government or in their own workshops. Paragraphs 5 and 6 of the case shew that it is no question of agency, but that the defendants, under a contract with the secretary of state, have undertaken to supply certain articles which they may purchase of other persons, or which they have in stock, or which they may manufacture for the purpose.

[LUSH, J. The question is, whether it is a contract for sale or a contract for employment. I do not see anything to make this different from an ordinary mercantile contract. A manufacturer is asked to supply so many rifles, and the property in what he manufactures, even under this contract, would not be in the Crown until he chose to deliver.]

That is a strong point in the case. Suppose that these rifles had been rejected by the Crown, they being supplied under contract and tender, on the ground that they were thought defective, what would be the situation of the parties who manufactured them in violation of the patent ?

[COCKBURN, C.J. I quite concede that in this case it is not necessary to go so far (although I should not shrink from going to that extent) as to say that the Crown, instead of itself manufacturing, might not employ people as its servants to manufacture. That would be a totally different thing. But here there is a simple contract between the Crown and the plaintiff, just as if any person had ordered a supply of rifles. It is simply a contract for the manufacture and sale of a certain quantity of rifles. I do not see any distinction between this case and an ordinary case where a private person orders a thing.]

The Court then called upon

Sir J. Holker, S.G. (*C. Bowen,* with him), for the defendants. The alleged infringement of the plaintiff's patent is a sale of rifles to the Crown under the terms of a contract entered into between the secretary of state and the defendants; and the question is, assuming the rifles were made and furnished under the contract, is the furnishing of the rifles under the contract such an act as

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subjects the defendants to an action for infringement? The contract is that the defendants shall deliver a certain number of rifles, and it is a condition of that contract that the Crown shall keep the defendants indemnified against the claim of any patentee. Assuming that the contract is to manufacture rifles for the use of the Crown—for there is no distinction whether the contract be to manufacture rifles for the Crown or to sell rifles for the use of the Crown—and that there is a term in the contract that the Crown shall indemnify the manufacturer of the rifles against any claim by the patentee, if the Court were to hold that the defendants, the manufacturers of the rifles, are liable in an action at the suit of the patentee, they would be holding that the Crown is indirectly liable where the Crown would not be directly liable. It was decided in *Feather* v. *The Queen* (1) that the Crown is at liberty to use a patented article, and the Crown is also at liberty by its servants to manufacture the article. Where, instead of manufacturing by its servants, the Crown engages some one else to manufacture and contracts to indemnify the manufacturer against a claim for royalties, to hold that an action would lie by the patentee against the manufacturer would be to make the Crown liable. There is no distinction between the Crown making the rifles in its own workshops by its servants and the Crown employing a private firm to make them. They are made in both cases for the use of the Crown. On the ground of public policy it would be disastrous if it were not so, because the government would be at the mercy of a particular patentee at a time of great danger. It might be that the patentee could not supply the requisite number of rifles, nor the licensees of the patentee.

[COCKBURN, C.J. The defendants here are acting as contractors, that is to say, they are acting independently, and they are to be paid for the articles to be supplied. If the Crown had hired the defendants' workshops and their servants, and employed the defendants to manufacture for them, that would have been a different case.]

There is but a slight difference between the Crown employing the defendants to manufacture rifles for it and entering into a contract with them for the sale of rifles with an indemnity.

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

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[COCKBURN, C.J. I do not think it a slight difference. I can see no reason in point of justice, still less in point of public policy and expediency, why a man who makes an invention of such a kind should not, if the government on behalf of the public choose to avail themselves of it, be paid by the public for the invention of which he is the discoverer.]

The question is whether this is not a user by the Crown; if it be, then *Feather* v. *The Queen* (1) is in point.

COCKBURN, C.J. In this case I think our judgment should be for the plaintiff. I have already in the course of the discussion thrown out the view which I entertain, and it is scarcely necessary to repeat it. The matter lies in the smallest possible compass. If a man has patented an article, the letters patent give him the exclusive use of the invention and the exclusive right to manufacture the article in conformity with the invention, unless he gives his permission to others to use the patented invention, in which case he is entitled to make his own terms and to obtain a royalty for the licence to use it. It is very true that in *Feather* v. *The Queen* (1) the question was raised as to whether the right which was good against all subjects of the realm was equally applicable as against the Crown. We thought ourselves bound by well-established authority to say that the Crown was entitled to succeed, on the ground that all grants made by the Crown must be taken in a favourable light to the grantor, and adverse to the grantee, and there was nothing in the grant of the patent to exclude the Crown from the use of that for which it gave the exclusive right of user to the patentee. But this case is very different. The manufacturer in this case enters into a contract to furnish certain articles. To my mind there is nothing in principle which creates any difference between articles sold to the Crown and articles manufactured under a contract for the use of the Crown. To test the substantial character of the Solicitor General's proposition, I will suppose that a manufacturer has in stock a quantity of these rifles not manufactured under a contract with the Crown, but manufactured by himself as a speculation or in the ordinary course of his business, and he has them in stock for sale, he being under the obligation of paying for a licence for the use of the

1 Q.B.D. 392

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

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patented invention before he can sell the article. Is he exonerated from those conditions simply because it happens that the government propose to be his customers? It would be impossible to contend for a proposition so extravagant as that. I see no difference between that case and the present. If any one else but the Crown required these things, they could not be sold or manufactured without paying for the licence. As regards public policy there can be no question. If the principle on which patents are granted for inventions be a correct one, about which I do not entertain much doubt, but upon which it is unnecessary to express an opinion at present,—but, starting with the assumption that the granting of a patent is a wise policy, it is not desirable to extend the principle laid down in *Feather* v. *The Queen*. (1) The Crown is not before the Court, as was the case in *Feather* v. *The Queen*. (1) This is a case in which subject and subject are before the Court as litigants. One subject complains of his right having been invaded, which the other most undoubtedly has invaded, unless it has been done by a lawful command of the Crown. It is said that this is a matter which the Crown has power to authorize. That might be the case if the party manufacturing the article were the servant or the immediate agent of the Crown, and not an independent contractor; but here the defendants are independent of the Crown, they are not called upon to enter into this contract if they do not please, it is their own act and at their own option; and on these grounds I think they ought to pay the patentee compensation for the use of his invention.

MELLOR, J. I am of the same opinion. I was party to the judgment in *Feather* v. *The Queen*. (1), and I may say that no member of the Court ever contemplated the extension of that doctrine beyond the limit there laid down. This is not a case in which the Crown is introduced, except incidentally. This is an action between subject and subject. It might have been that during the negotiation for the contract there was a discussion as to whether the defendants would be liable to pay royalties to the patentee, and that those representing the Crown may have agreed to indemnify the defendants against the royalties. Even if such a term were in the contract, I think it would make no difference. I do not

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

think because the Crown undertakes to indemnify a manufacturer against the liability to pay royalties to a patentee, that the Crown has an authority to license that person to manufacture a patented article.

LUSH, J. I am of the same opinion. The Crown grants to a patentee the exclusive right to manufacture the patented article as against all subjects of the Crown, but not the right to manufacture as against the Crown itself; and by implication the Crown reserves the right to manufacture the patented article by its own servants. Now that brings us to the question in this case, which is, Is this a contract for employment by which the Crown employs the defendants as its agents to manufacture the rifles for the Crown, or is it a contract of sale, by which the manufacturers engage for their own profit to provide the Crown with the patented article? I think it is clearly a contract of sale. This case is entirely different in principle from the case of *Feather* v. *The Queen*. (1) The claim set up by the defendants is a right to infringe a patent and manufacture the patented article for their own profit, in order to enable them to sell the article when so manufactured to the government. That is, I think, far beyond the scope of the privilege that the Crown enjoys, and therefore I think our judgment must be for the plaintiff.

ARCHIBALD, J. I am also of opinion that our judgment must be for the plaintiff. These proceedings are not against the Crown; if they were they would be governed by the case of *Feather* v. *The Queen* (1); but these are proceedings against a company, who infringe the plaintiff's patent right in order to carry out the contract to supply and deliver these rifles to the Crown. It is said that a part of the contract is, that they are to be supplied on the terms that the defendants are to be protected against the patentee. I do not myself consider that the indemnity is a part of the contract which is referred to in the special case; but even if it were, it would make no difference. That is a thing the Crown cannot do. No doubt, if this contract stipulated that these persons were to be employed as servants of the Crown at a salary or wages, just as if they were in the workshop of the Crown, that would be a

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

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different case. The rifles then would be manufactured by the Crown, and there would be a substantial difference between such a contract and the present: for this contract might have been performed by supplying articles manufactured long before the date of the contract. These rifles might have been furnished by sub-contractors, and therefore this was not a case in which the Crown was itself manufacturing. Where there has been an engagement by the manufacturer of rifles with sub-contractors, it seems to me impossible that an infringement can be covered by an understanding on the part of the Crown to protect the contractor against the patentee. I think if that formed part of the contract it would be inoperative to protect the contractors from liability. I do not think that this case falls within the principle of *Feather* v. *The Queen* (1); and I quite agree that there is no ground on which we ought to extend the principle of that decision.

Judgment for the plaintiff.

Attorneys for plaintiff: *Stibbard & Cronshey.*
Attorney for defendants: *Solicitor for the War Department.*

Jan. 11.

EX PARTE JOHN CUMBERLAND.

Attorney and Solicitor—Articled Clerk—Notice of Application for Admission as Attorney—Rule 5 *of Reg. Gen.* (*Attorneys*), *Hil. T.*, 1853.

C., an articled clerk, having duly served his five years, gave notice before Michaelmas Term, 1874, of his intention to apply to pass his final examination in Hilary Term, 1875; but he purposely abstained from giving notice of his intention to apply for admission as an attorney, because negotiations were pending as to a clerkship, one of the conditions proposed being that he should not apply to be admitted during this service. These negotiations went off, and C. was afterwards offered an advantageous clerkship, provided he were admitted in Hilary Term. C. accordingly applied to the Court on the first day of Hilary Term, that the one term's notice required by Rule 5 of Reg. Gen. (Attorneys), Hil. T., 1853, might be dispensed with, and that he might be admitted an attorney on the last day of the present term:—

The Court refused the application.

JOHN CUMBERLAND having been bound to an attorney and solicitor, and having duly served under his articles for five years,

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

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in October, 1874, gave notice of his intention to apply for his final examination in Hilary Term, 1875; but he did not then give notice of his intention to apply for admission, the reason being that the attorney with whom he had been articled had offered to take him as a clerk on condition that he should not, while in this service, apply to be admitted. Cumberland had at first agreed to remain as clerk, but a further condition was proposed, which he was unwilling to comply with. During the negotiation the time for giving notice before Michaelmas Term, 1874, of the intention to be admitted in Hilary Term, 1875, as required by Rule 5 of Reg. Gen. (Attorneys), Hil. T., 1853, expired. Afterwards Cumberland had been offered an advantageous appointment as managing clerk to a solicitor in Bristol, provided he was admitted during the present Hilary Term.

Woodward Wallis, on an affidavit disclosing the above facts, applied to the Court that the one term's notice might be dispensed with, and that Cumberland, on now giving formal notice, might be admitted on the last day of this term. He cited *In re Hancock* (1), and *Ex parte Estcourt.* (2)

[LUSH, J. The applicant gave the notice of his intention to be examined, which makes the case stronger against him, because any person intending to oppose the applicant's admission would be thrown off his guard by seeing that he only gave notice of being examined, and not of applying to be admitted. The present application amounts to asking us to abrogate the Rule as to notice as unnecessary and injudicious.]

COCKBURN, C.J. The applicant had had what he then considered an advantageous offer; and, with the object of complying with the condition of the offer, in the first instance, he intentionally abstained from giving the proper notice of his intention to apply for admission in Hilary Term. He now repents, and asks us to assist him. We cannot interfere.

MELLOR, LUSH, and QUAIN, JJ., concurred.

Application refused.

Attorneys for applicant: *Little & Little, Bath.*

(1) 4 Ad. & E. 779. (2) 8 Jur. 985.

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THE LEATHER-CLOTH COMPANY *v.* HIERONIMUS.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17—*Sale of Goods—Memorandum in Writing—Variation by Seller in Performance of one of Terms—Ratification by Buyer.*

10 C.P. 600
1 C.P.D. 224

The defendant's son, H., junior, gave a verbal order in London on the 18th of February, 1870, to the plaintiffs to send three cases of leather-cloth to the defendant at Cologne; the plaintiffs had been in the habit of forwarding goods to the defendant through H. & P., Rotterdam, and H., junior, being informed that the port of Rotterdam was blocked with ice, directed that the three cases should be sent through Messrs. G., Ostend. When the plaintiffs had executed the order Rotterdam was again open, and Messrs. G. had given up their Ostend route. The plaintiffs therefore forwarded the three cases through H. & P., via Rotterdam; and on the same day, the 1st of March, they forwarded the invoice from the plaintiffs to the defendant, giving the price, &c., with a letter, in which they said: "Inclosed we hand you invoice of three cases leather-cloth. This order came through Mr. H., junior, who instructed us to send it through Messrs. G., Ostend, but as they have given up that route we have sent it through H. & P., Rotterdam, as before." The defendant received but did not answer this letter, but gave further orders for goods to the plaintiffs, which were forwarded via Rotterdam. The ship by which the three cases were sent was stranded and the goods damaged. On the 28th of June the plaintiffs wrote to the defendant, inclosing their statement of account, and requesting payment; and on the 5th of July defendant wrote to plaintiffs, acknowledging the receipt of the statement, and saying, "In looking over your statement I find you have charged me for goods which have been entirely lost in the sunk ship, being sent via Rotterdam. You state in your letter of March 1st that Mr. H., junior, instructed you to send the goods through Messrs. G., via Ostend, but on account of their having given up that route you sent, without any instructions, the goods via Rotterdam." Further correspondence ensued, and defendant having refused to pay for the three cases, an action was brought, and the above facts and correspondence appeared on the trial.

The judge ruled that there was sufficient memorandum in writing, signed by the defendant, of the contract; and left it to the jury to say, from the silence and subsequent conduct of defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam before the loss; and they found in the affirmative, and a verdict passed for the plaintiffs:—

Held, that there was sufficient memorandum of the original contract; and that there was evidence from which the jury might find that the defendant had assented to the substituted performance in the change of route, which assent need not be in writing.

Action, on the common counts, to recover 52*l.* 4*s.* 6*d.*, the price of leather-cloth sold and delivered by the plaintiffs to the defendants.

Plea: never indebted. Issue joined.

At the trial before Archibald, J., at the London sittings after

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Michaelmas Term last, it appeared that the plaintiffs, a company for the manufacturing of leather-cloth, &c., in London, had been in the habit of supplying goods to the defendant in Cologne, and of sending the goods through Messrs. Hudig & Pieters, Rotterdam, the defendant's agents. On the 18th of February, 1870, the defendant's son, acting as his father's agent, came to the office of the plaintiffs in London, and ordered by word of mouth three cases of leather-cloth. He was informed by the plaintiffs' manager that the port of Rotterdam was blocked with ice, and he was asked how the cloth was to be sent, and he said they had better, in that case, forward it to Messrs. Gaudet Frères, Ostend. Before the order could be executed by the plaintiffs the port of Rotterdam was again open, and Messrs. Gaudet had ceased to receive goods to be forwarded via Ostend. The plaintiffs accordingly shipped the goods to be forwarded by the old route through Hudig & Pieters, Rotterdam; and on the 1st of March the plaintiffs wrote to the defendant the following letter:—

"Inclosed we beg to hand you invoice of W H 30/32 3 cases leather-cloth. This order came through Mr. Hieronimus, junior, who instructed us to send it through Messrs. Gaudet Frères, Ostend, but as these gentlemen have given up their Ostend route, we have sent it through Messrs. Hudig & Pieters, Rotterdam, as before." (Signed by the authorized agent of the plaintiffs.)

This letter was duly received by the defendant, but no answer was returned. A few days afterwards the ship on which the cases had been shipped was stranded off Rotterdam, and the leather-cloth was spoilt or injured.

On the 28th of June the plaintiffs wrote as follows:—"We take the liberty to hand you inclosed statement of your account with us, shewing a balance of 125*l.* 4*s.* 6*d.* in our favour, and to request you, as some of the items are now overdue, to favour us with a remittance as soon as possible."

To which the following reply was sent:—

"Cologne, July 5th, 1870.

"I am in receipt of your letter, June 28th, with statement, but as Mr. Hieronimus is out of town for a few weeks, it will be settled after he has returned. In looking over your statement, I find that you have charged me for the goods which have been entirely lost

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by the sunk ship *Ravensburg*, being sent via Rotterdam. You state in your letter, March 1st, that Mr. Hieronimus, junior, instructed you to send the goods through Messrs. Gaudet Frères, via Ostend, but on account of their having given up the Ostend route, you sent, without any instructions, the goods through Messrs. Hudig & Pieters, Rotterdam. In the first place, I learn that Messrs. Gaudet Frères would not have refused the goods, although they seemed to have given up that line, as they have a correspondent in Ostend. Secondly, I certainly expected you would have informed Mr. H., junior, of it, and asked him how you were to send it in that case, as he had given the direction of sending the goods." (Signed by procuration for the defendant.)

The defendant wrote again to the plaintiffs:—

"Cologne, 20 Sept. 1870.

"The statement you sent me on the 28th June, ac., shews a balance in your favour of 125*l.* 4*s.* 6*d.* You will remember the unhappy accident that has befallen your shipment of 28th Feby., and that it has not been my fault if, by your directing this shipment via Rotterdam instead of the way prescribed, via Ostend, it has been lost by gross average.

"I am, therefore, very sorry to be obliged to decline all responsibility respecting this shipment of 28th Feby., the amount of which is to be deducted off the above balance—

	£	*s.*	*d.*
	125	4	6
Less .	52	4	6
	73	0	0
To add shipment of 11th July .	48	6	6
Balance .	121	6	6."

Between the 1st of March and the 28th of June further orders had been given by the defendant and executed by the plaintiffs, and the goods forwarded via Rotterdam.

It was objected, on behalf of the defendant, that there was no evidence of the original or substituted contract to satisfy the Statute of Frauds. The learned judge ruled that there was sufficient evidence of a memorandum in writing signed by the defendant or

his agent, of the original contract, in the letter of the 5th of July, referring to the plaintiff's letter of the 1st of March, together with the invoice. And he left it to the jury to say, whether or not, from the silence after the receipt of the letter of the 1st of March and subsequent conduct of the defendant, there had been an assent by him to the change of route from Ostend to Rotterdam, before the loss.

The jury found in the affirmative; and a verdict passed for the plaintiffs for the amount claimed.

F. Turner moved for a new trial on the ground of misdirection; contending that as there was nothing in writing of the defendant's to show his assent to the change of route, there was no memorandum in writing signed by the defendant of the substituted contract, within the Statute of Frauds. He admitted that, on the authority of *Wilkinson* v. *Evans* (1) there was a sufficient memorandum of the original contract; but he contended that the substituted contract as to the mode of delivery must also be evidenced by writing, as the mode of delivery was an essential part of the contract. (2)

COCKBURN, C.J. I am of opinion that there ought to be no rule. The objection to the judge's ruling is that there was no written memorandum within the Statute of Frauds. There was at first no written contract, the order to the plaintiffs was verbal by the defendant's son; but on the 1st of March the plaintiffs sent a letter to the defendant with an invoice of the goods, giving the price, &c., charging him as purchaser, which satisfied the statute, so far as the plaintiffs were concerned; and the letter further added that, though the order had been to send the goods by Ostend, the plaintiffs had sent them via Rotterdam. The defendant, therefore, became at that time aware of what route the goods were coming by, and he made no objection whatever. It may be observed that the Rotterdam route by the particular agents was by the course of business the route which the defendant was known to prefer, and the defendant's son directed the route to be changed to Ostend

(1) Law Rep. 1 C. P. 407.

(2) See *Noble* v. *Ward* (Law Rep. 1 Ex. 117; S. C. in Ex. Ch. 2 Ex. 135.)

12 Jur. N.S. 167

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merely because the port of Rotterdam was blocked with ice. It turned out that at the time the goods were ready the Ostend route was no longer available, because the agents had discontinued to send by that route; and the plaintiffs therefore thought it better to send the goods by Rotterdam, and communicated this fact to the defendant. So matters remained till the 28th of June, when the plaintiffs sent in their account; in the meantime, however, further orders had been given by the defendant, and the goods forwarded to him from the plaintiffs by Rotterdam. The defendant's letter of the 5th of July refers to and admits all the terms of the contract; and if there had been no question as to the route, there can be no doubt that this letter of the defendant of the 5th of July, coupled with the letters of the plaintiffs and the invoice to which it refers, would have amounted to a written contract binding on the defendant within the statute. But it is said on behalf of the defendant, inasmuch as the order admitted by the defendant was the order to send by Ostend, and the goods were sent by the substituted route of Rotterdam, this substitution forms a new contract, and although the substitution may have been ratified by the defendant, yet of that new contract there was no memorandum in writing. In the first place, I doubt whether a direction to deliver to a particular carrier can be said to be part of the contract of sale. No doubt the mode of delivery to the particular carrier is part of that which the seller engages to do, and the sending to another carrier would not amount to delivery to the buyer. But suppose the order had been to send by the Midland Railway Company, and the goods had been sent by the North Western, still, if they arrived quite safely by the North Western, would it be competent to the buyer to refuse acceptance? I think that proposition could scarcely be maintained, the mode of delivery being unimportant so long as actual delivery has been accomplished. But suppose this were not so; it is impossible to say that there was not in this case a written memorandum of the original contract, and that the departure from the terms of that contract in the mode of delivery cannot be ratified by the other party without writing. If he receives the goods, or if he has ratified the mode by which they were sent, he cannot be heard to say that it was a new contract and cannot be enforced because it was not in writing. There was suffi-

cient evidence in the present case for the jury that the defendant had ratified the route by which the plaintiffs had forwarded the goods; consequently the defendant was bound to pay for the goods, and the verdict for the plaintiffs must stand.

BLACKBURN, J. I agree that there should be no rule. The contract was by Mr. Hieronimus, junior, and the plaintiffs by word of mouth. But on the 1st of March the plaintiffs sent the following letter:—[The learned judge read the letter.] On signing this letter, the plaintiffs clearly signed such a memorandum as would charge them within the Statute of Frauds. The facts are, that after the defendant received that letter, he did, by what the jury have found amounted to a waiver, say, by words or conduct, or something equivalent to signs, I make no objection to the mode by which you, the plaintiffs, have sent the goods. Up to that time there was nothing in writing signed by the defendant. But there would have been no defence by the plaintiffs under the original contract, without more, for not sending the goods by Ostend; there would, however, have been a good defence on the facts, amounting to this:—"We (the now plaintiffs) satisfied all the essentials of the contract by sending the leather by Rotterdam, with which deviation from the contract you, by word of mouth or by your silence, expressed that you were content;" and it is clear that the defendant would have failed in an action against the plaintiffs for not delivering the goods. But it was argued by Mr. Turner that though the defendant had accepted, by parol, the substituted mode of performance, it would have been necessary for the plaintiffs to show that this acceptance of the substitution was by something in writing signed by the defendant. I do not see on what ground; and I do not think it would have been necessary. But while matters remained as they were, the plaintiffs could not have maintained an action against the defendant for the price, because there was nothing in writing signed by him. However, about four months afterwards, the defendant does write, on the 5th of July, the following letter:—[The learned judge read the letter.] The first part of the letter, in the most distinct terms, refers to the plaintiffs' letter of the 1st of March, and clearly admits that all that was said in it was quite

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true. And the latter part of the letter goes on to say that the plaintiffs ought to have obtained the defendant's sanction to the change of route from Ostend to Rotterdam. This letter was signed by the defendant or his agent, and therefore the statute has been satisfied, and there is a memorandum in writing of the contract, signed by the defendant, the party to be charged, or his agent. But it was argued that though there was that letter of the defendant to the plaintiffs, saying, Your statement is perfectly true, yet, as it went on, not to ratify, but to object to the substituted delivery, there was no assent in writing to the substituted contract. The answer is: The plaintiffs do not rely on a substituted contract, but on the original contract; and they say, You, the defendant, on being told of the substituted delivery, did not object, but, by your conduct, assented to it. I cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing and may not be by parol, though the original contract must have been in writing. They are quite different things, the proof of a substituted contract and the proof of a ratification or approval, after performance, of the substituted mode of performance. Then I think there was evidence enough for inferring this ratification or approval by the defendant; and my Brother Archibald is not dissatisfied with the verdict.

MELLOR, J. I desire to add nothing to what has already been said by my Lord and my Brother Blackburn.

ARCHIBALD, J. I am of the same opinion. The fallacy in Mr. Turner's argument arises from the confusion between the evidence of the contract and the evidence of the performance. There was clearly the proper evidence of a contract of sale of leather-cloth to be sent by Ostend, viz. the letter of the defendant of the 5th of July, referring as it did to the plaintiffs' letter of the 1st of March inclosing the invoice. What was the evidence as to how that contract was performed? The plaintiffs forwarded the goods by Rotterdam instead of Ostend; but the jury found, on satisfactory evidence, that the delivery in the old accustomed way, through Hudig and Pieters, Rotterdam, was ratified or assented to by the defendant. The evidence was, that after the receipt of the plain-

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tiffs' letter of the 1st of March, with the invoice, no objection was made by the defendant for four months; and there was also the circumstance that other orders had been given by the defendant, and the goods sent by the plaintiffs in the old way. These facts and the long silence satisfied the jury that the defendant had made no objection, but had waived the change from Ostend to Rotterdam; and I thought the evidence sufficient to justify the jury in so finding. There is clearly no necessity that the waiver should have been in writing. The verdict ought, therefore, to stand.

Rule refused.

Attorney for defendant: *W. F. Stokes.*

RAMSDEN *v.* BREARLEY.

Jan. 26.

*Husband and Wife—Married Woman deserted by Husband having obtained "Order of Protection" entitled to sue in tort—*20 & 21 *Vict. c.* 85, *s.* 21.

A wife who has been deserted by her husband and has obtained an order of protection under 20 & 21 Vict. c. 85, s. 21. can bring an action in her own name for libel.

6 C.L.D. 142

ACTION for libel, alleging as special damage that one B., with whom the plaintiff was trying to establish a boarding-house, ceased to know or to deal further with her.

Plea in abatement, the coverture of the plaintiff.

Replication, that the plaintiff being a wife deserted by her husband did, in pursuance of the provisions of the statutes in that case made and provided, obtain an "order of protection," which "order of protection" was, before the accruing of the causes of action and still is, of full force and effect.

Demurrer and joinder in demurrer.

No counsel appeared in support of the demurrer.

Herschell, Q.C., for the plaintiff. The question is, whether a wife who is deserted by her husband and has obtained an order of protection under s. 21 of 20 & 21 Vict. c. 85, can in her own name sue in tort for an injury to her reputation. By s. 21 "if an order

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of protection be made the wife shall be and be deemed to have been in the like position in all respects with regard to property and contracts and suing and being sued as she would be under this Act if she obtained a decree of judicial separation." The position of a wife who has obtained a decree of judicial separation is defined by s. 26: "In every case of a judicial separation the wife shall whilst so separated be considered as a feme sole for the purposes of contract and wrongs and injuries and suing and being sued in any civil proceeding." Reading these sections together, the wife in either case, whether she have obtained an order of protection or a decree of separation, is to be considered as a feme sole, and can sue in her own name for a breach of contract or for a tort. It is as essential that she should be able to sue in respect of a tort which injuriously affects her trade as it is in the case of a breach of contract. It may be necessary that she should protect her property by bringing one or other of these actions. It would be, no doubt, contended on the other side that, the language of the two sections being different, the protection given to a wife under s. 21 is only a protection to property, while that given to a wife who has obtained a decree of judicial separation is a protection to her person as well as her property. This is a narrow construction; the intention of the legislature to be gathered from s. 21 evidently is, that the wife should in both cases be considered to be in the same position as a feme sole, with all the rights of a feme sole. Whether a married woman can maintain an action in her own name for a tort under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), has recently been discussed in *Summers* v. *City Bank*. (1)

COCKBURN, C.J. I am of opinion that our judgment should be for the plaintiff. The action is for libel alleging special damage, and is brought by a married woman who has obtained an order for protection under s. 21 of 20 & 21 Vict. c. 85. The plea is, that she is a married woman, to which the replication replies, that she obtained an order of protection under s. 21; and the question is, whether this order places her in such a position independent of her husband, as that she can maintain an action

(1) Law Rep. 9 C. P. 580.

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in her own name. The question turns on ss. 21 and 26 of the Act. Section 21, after providing that a wife deserted by her husband may apply for an order that shall protect her, and shall be entitled to such an order, goes on to say, "if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she had obtained a decree of judicial separation." Then we are to look and see what would be the condition of a married woman having obtained a decree for a judicial separation, and that depends on the terms of s. 26, which provides that in every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purpose of contract, and wrongs, and injuries, and suing and being sued in any civil proceeding. Now if a married woman is, under s. 21, to be considered as in the same position as though she had got a judicial separation, it would follow that for the purpose of suing for any wrongs or injuries in a civil proceeding she would be in the same position as though she were a feme sole. But are the words, "in like position in all respects, with regard to property and contracts, and suing and being sued," large enough to embrace the case of a married woman who has obtained an order for protection in respect of her capacity to sue generally, or only in respect of property and contracts? I have some doubt, looking to the immediate purpose of the legislature in passing that section, whether it was at all contemplated that such a case as the present might arise; nevertheless, if the words of the section are capable of being interpreted in the larger sense, they ought to be so interpreted; and more especially as justice requires that a woman, who has been deserted by her husband, and has to take care of and protect herself (her lawful protector having abandoned her), shall be entitled to protect herself, and her property, and her character, and her reputation, if she is assailed by libels or slanderous statements, in the same way as though she were a feme sole. The words "suing and being sued" might, in one sense, be read as applicable to what has immediately gone before, namely, in respect to property and contracts; but there is nothing to compel us to put that more restricted sense

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upon them, and inasmuch as it is only carrying out what, if present to the minds of the legislature, would have been thought justice, that a married woman under the circumstances should have that protection, the words being large enough, we ought so to construe them. Moreover, I am struck by an observation which my Brother Lush made to me in the course of the discussion, that if a married woman were to sue in the husband's name, and the action were brought in the name of the husband, the husband would be dominus litis, and the husband would be entitled to the damages and the costs. I think, upon the whole, we ought to give as large and liberal a construction as we can to the words, and hold that a woman who has obtained an order of protection is in all respects in the same position as regards wrongs and torts as she would be as regards contracts.

MELLOR, J. I am of the same opinion. The object of the Act as contained in ss. 21, 25, and 26, is to protect a wife against her husband; against his taking her property under pretence that he is her husband, and against the husband's creditors; and to give power to the wife to sue in her own name. The last clause in s. 21 provides that the wife who has obtained an order of protection shall be and shall be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a judicial separation. No doubt, it might be said that that clause would be satisfied by giving the wife the same power of suing and being sued with reference to contracts and property as she would have in the case of a judicial separation as a feme sole; but I think that would be a narrow construction when we look at the following sections. We must take the whole purpose of the Act, and construe s. 21 in connection with ss. 25 and 26. Section 25 gives the largest possible protection with regard to property and all the rights incident to property, and it is followed by s. 26, which says what a wife who had obtained a judicial separation shall be enabled to do in respect of suing and being sued. I think we may interpret the words of s. 21, "suing and being sued," as not confined to suing for a breach of contract, but suing in every respect as if she were a wife who had

obtained a decree of judicial separation, that is, suing for a wrong as well as for a breach of contract.

LUSH, J. I am of the same opinion. A woman who has been deserted by her husband is in the same helpless condition as a woman who has obtained a decree of judicial separation. Therefore the object of the order of protection is to put her in the same position of protecting herself as well against strangers as against her husband; and I think we should not be carrying out the objects of the Act unless we gave to the words of s. 21 the wider meaning of the words, as applying the protection as fully to the woman who obtained a protecting order as to one who had obtained a judicial separation.

ARCHIBALD, J. I am of the same opinion. It seems to be attributing an inconsistency to the legislature to suppose they intended a married woman who has obtained an order of protection to be able to sue only in the case of contracts and not in other cases; and as this comes within the mischief intended to be provided against, I am disposed to give a liberal construction to s. 21; and I think the words "suing and being sued" are not confined to contracts, but, read together with the other words, they put her in the same position as if she were a feme sole with the general power of suing and being sued.

Judgment for the plaintiff.

Attorney for plaintiff: *Alfred Howard.*

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HALL, Appellant; NIXON, Respondent.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98) *s.* 34—*Local Board of Health —Bye-laws, Validity of.*

A local board of health made bye-laws, under s. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98): "6th. Every person intending to erect any new building shall give fourteen days' notice, to be delivered to the board's surveyor, or left at his house, with detail plans and sections, and any person who shall erect any new building without delivering such notice and plans and sections, or without having the plans, &c., approved by the board, shall be liable to a penalty of 40*s*." By bye-law 36, the board may cause to be altered or pulled down any building begun or done in contravention of the bye-laws:—

Held, that the 6th bye-law was within the powers conferred by s. 34, and was reasonable, and therefore valid.

Young v. *Edwards* (33 L. J. (M.C.) 227); and *Hattersley* v. *Burr* (4 H. & C. 523) discussed.

Case stated by justices of the borough of South Shields under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, the surveyor of the corporation of the borough, being the local board of health, against the respondent, under the 6th bye-law made by virtue of 21 & 22 Vict. c. 98, s. 34, by the board, charging that the respondent, on the 13th of January, 1874, did unlawfully erect a certain building, to wit, a certain dwelling-house in Challoner Grove, in the said borough, without first giving fourteen days' notice in writing to the surveyor of the board, and leaving with him the plans and sections of such building and having the same approved of by the said local board, contrary to the building bye-laws of the said borough.

At the hearing it was proved that on the 13th of January the surveyor visited the new buildings in course of erection in Challoner Grove by respondent, and found him building two houses, for which he had not previously submitted detail plans and sections as required by the 6th bye-law of the board. On the same day the surveyor had caused a notice to be given to the respondent, forbidding him to build further until he had furnished plans, and had them approved by the board. The respondent thereupon submitted plans to the board, and at their next meeting the plans for

some cause were rejected, and a prosecution ordered against the respondent for a breach of the 6th bye-law.

It was contended on the part of the appellant that it was immaterial for the respondent to shew that he was complying in all respects with the bye-laws, as to the construction of the buildings, sufficiency of space about the buildings, or the drainage. The respondent had committed an offence by not having given fourteen days' notice and submitted detail plans and sections and had them approved by the board, as required by the 6th bye-law, before building; and the local board pressed for a conviction.

It was admitted that a plan called an estate plan had been passed by the local board about two years ago for the building of twenty houses to compose when completed the street called Challoner Grove, which plan complied with the requirements of the bye-law as an estate plan. This plan was submitted by the owner of the ground and not by the respondent. It shewed the level and width of the street, and the yard space behind the houses when built, also the house drainage, their size, depth, and inclination. The owners of the ground had from time to time sold off sites, and the respondent was a purchaser of several of them. It was admitted on the part of the respondent that in respect of the two houses recently commenced no plans had been delivered to the board, but that of itself, it was contended, was not an offence punishable by justices in a summary manner; that the respondent was building according to the plans passed by the board as an estate plan, which gives the line of street and yard area behind, and that in all other respects he was complying with the building bye-laws of the board, which provides for the construction of houses, and that in respect of the two houses just recently commenced, he was building them upon plans passed by the board for the two houses there immediately adjoining, the two just commenced being intended to be exactly the same, and comformable in every way to the bye-laws. It was further contended on the part of the respondent that if the respondent was building anything contrary to the building bye-laws, he was not punishable in a summary manner by justices; but that the local board might, under their 36th bye-law, order the buildings, or any of them, to be removed or altered, and, in case of default, the board might proceed

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to pull down such buildings to the extent to which the same might be an infraction of the bye-law.

By 21 & 22 Vict. c. 98, s. 34, ss. 53 and 72 of 11 & 12 Vict. c. 63 are repealed; and in lieu thereof it is enacted as follows:—

Every local board may make bye-laws with respect to the following matters:

(1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof.

(2.) With respect to the structure of walls of new buildings for securing stability, and the prevention of fires.

(3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.

(4.) With respect to the drainage of buildings, to water-closets, privies, ash-pits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun, or done in contravention of such bye-laws: Provided always that no such bye-law shall affect any building erected before the date of the constitution of the district.

The 6th bye-law is as follows:—

Every person who shall intend to erect any new building shall give fourteen days' notice to the local board of such intention, by writing, delivered to the surveyor of the local board, or left at his office, and shall at the same time deliver to such surveyor, or leave at his office, detail plans and sections, drawn in ink, on drawing-paper, tracing-cloth, or mounted tracing-paper, on a scale of one-eighth or one-quarter of an inch to every foot, of every floor of such intended new building, shewing the thickness of the walls, the dimensions of the rooms, the situation of the fire-places, stoves, chimneys, and flues, and generally the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, gully and drain, ashpit, coal-house, and all other buildings and appurtenances connected therewith; and such plans and sections shall be accompanied by a description of the materials of the building, the mode in which it is proposed to be constructed, and the number of the site on estate plan it is intended to occupy.

1. Walls of proposed buildings to be coloured red; walls of adjoining buildings (if any) Indian ink, or some dark colour; timbers yellow; all rooms and parts covered with a roof to have a light wash of burnt sienna or a light yellow colour; yard and foot pavement to have a light wash of blue.

The plan and section to be neatly inked in with Indian ink.

2. Every plan submitted for the approval of the corporation must be lodged at the borough surveyor's office on the Tuesday previous to the fortnightly meeting of the Town Improvement and Public Health Committee.

A block plan in all cases, where no estate plan shall have been deposited and approved, shall, if so required by the local board, be lodged at the borough sur-

veyor's office as aforesaid, drawn in ink on drawing-paper or mounted on cloth to the scale of one inch to every forty-four feet, shewing the position of the buildings and appurtenances of the properties immediately adjoining to the extent of six feet at least on all sides, the width or level of all streets abutting thereon, the level of the lowest floor of the intended building, and of the yard or ground belonging thereto. The plan shall shew also the proposed lines of house drainage and their size, depth, and inclination: Provided always, that the local board shall within fourteen days after receiving such notice, detail plans, and sections signify to the persons giving or sending the same whether they approve or disapprove thereof, and if they shall disapprove thereof, shall at the same time give the reasons why they disapprove of such plan.

Any person who shall erect any new building without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the local board, or in anywise contrary to plans and sections which have been approved of by the local board, shall be liable for each offence to a penalty of 40s.

Bye-law 36 is as follows:—

Where any work has been begun or done in contravention of the foregoing bye-laws, or any of them, it shall be lawful for the local board to give notice to the builder or other person who has done or doing such work, and the person for whom the same has been or is being done, of the particulars in which the said bye-laws have not been complied with. The said notice shall be served in the manner prescribed for the service by a local board of the notice referred to in the Local Government Act, 1858, s. 75. And it shall call upon the parties respectively to whom it is directed, to appear at a time and place therein named (which time shall not be less than seven clear days from the service thereof), and then and there to shew cause why the said work should not be removed, altered, or pulled down. If, after hearing the said parties, or such of them as shall appear in pursuance of the said notice, the local board shall be of opinion that no sufficient cause has been shewn to the contrary, it shall be lawful for the said local board to make an order, in writing, under the hand of their clerk, requiring the parties to whom the said notice is directed, and each of them, to remove, alter, or pull down the said work, as the case may, in the opinion of the local board, require, and within such time as to the said local board shall seem reasonable. Such order shall be served on the said parties respectively, in the same manner as the said notice, and if the surveyor of the said local board shall certify to them that, at the expiration of the time named therein, the said order had not been complied with, the local board may, if they think fit, cause such work to be removed, altered, or pulled down, as directed in the said order.

The justices carefully considered the latter part of s. 34, and not only the 6th bye-law, but the succeeding ones, and they were of opinion that as an estate plan had already been passed and approved of by the board, showing the whole of the houses to be built in Challoner Grove, there had been compliance with the bye-

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law, so far as the statute empowered the board to make one; and that the respondent had committed no offence in law by not delivering detail plans and sections; and they decided that the local board had no power to make an order constituting the respondent's conduct in this case an offence; and that the bye-law went beyond the powers given to the board by the Local Government Act, 1858.

The question for the opinion of the Court was, whether the construction the justices put upon the statute as applicable to this case was correct, and whether the 6th bye-law alleged to be made in pursuance of it was reasonable, and within the powers of the board as conferred by the statute.

C. Russell, Q.C. (with him *Dixon*), for the appellants. The 6th bye-law is perfectly reasonable, and is within the express power given by s. 34 of 21 and 22 Vict. c. 98. Nothing is said about imposing penalties by that section, but by s. 4 that Act and 11 & 12 Vict. c. 63, are to be read together as one Act, and by s. 115 of 11 & 12 Vict. c. 63, power is expressly given to impose reasonable penalties not exceeding 5*l.* for any breach of the bye-laws. Here the penalty is 40*s.* only. And by s. 129 these penalties are to be recovered before justices. Reliance seems to have been placed on the 36th bye-law as inconsistent with the 6th, or, at any rate, as making it unnecessary, and therefore unreasonable; but the two are perfectly consistent. Bye-law 6 requires notice previous to building, with a penalty for beginning to build before the plans have been approved, which must be within fourteen days; and then, as a penalty of 40*s.* would not be sufficient if the builder built a building not according to the bye-laws, bye-law 36 is added, and gives power to the board in such a case to pull the building down. There is nothing unreasonable in fining a man for not giving proper notice, although he may build in accordance with the bye-laws.

Herschell, Q.C. (*Crompton* with him), for the respondent. There is no power to impose a penalty for the breach of a bye-law, unless that power is expressly given.

[LUSH, J. Surely the power to impose a reasonable penalty is incident to the power to make a bye-law; a pecuniary penalty is

the appropriate remedy for the breach of a bye-law: see 5 Rep. 63 b.]

Not when, as here, there is another remedy given for enforcing obedience, viz. the pulling down of the building. The matter, however, is not without authority, and there are two or three cases very much in point against the validity of this bye-law. In *Hattersley* v. *Burr* (1) it was held that a local board had no power to make a bye-law, that before beginning to dig or lay the foundation of any new building a written notice of one month, at the least, shall be left with the clerk at one of the monthly meetings of the board, with plans and sections, with a penalty not exceeding 5*l.* for neglect in giving notice. Martin, B., thought the proceeding altogether wrong: "It seems to me that if a person gives notice that he is about to build and deposits plans, he may at once commence building. The board have power to inspect the building, and if it is in contravention of the bye-laws, they may order it to be altered or pulled down." Pollock, C.B., expressed a similar opinion; and Channell, B., added, "The argument for the respondents must go to this extent, that a man is liable to a penalty of 5*l.* for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the bye-laws." Again, in a previous case of *Young* v. *Edwards* (2) a bye-law with continuing penalties for building contrary to the bye-law was held ultra vires; and the case of *Brown* v. *Holyhead Local Board* (3) was relied on; but that case is scarcely in point with the present.

C. Russell, Q.C., in reply. In *Young* v. *Edwards* (2) the bye-laws were very different from and far more arbitrary than the present. In *Hattersley* v. *Burr* (1) the bye-law required a month's notice to be given at one of the monthly meetings of the board, so that two months might elapse without the person proposing to build being able to give a notice even, and much more before he could proceed to build. Channell, B., points this out; he says: "The bye-law does not simply require one month's notice, but that a month's notice shall be left with the clerk at one of the monthly meetings of the board. Could the board make a provision that, if a person

(1) 4 H. & C. 523. (2) 33 L. J. (M.C.) 227.
(3) 1 H. & C. 601; 32 L. J. (Ex.) 25.

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about to build met the clerk going to a board meeting and gave him the notice, that should not suffice, but that it must be given at a specific period only recurring at considerable intervals?" It may be observed that s. 34 leaves it entirely in the discretion of the board to make such provisions as to notices "as they may think necessary."

MELLOR, J. I am of opinion that the appellant is entitled to succeed, and that the magistrates were wrong in holding that the bye-law was not justified by the terms of the statute. The words of s. 34 as to the power of the local board to make bye-laws are very wide and comprehensive, and it enacts that "they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices," &c. Now, it seems to me a perfectly sensible way of carrying that out by making a bye-law that before beginning to build a new building notice shall be given to the surveyor of the board, care being taken to require no more than a reasonable notice; and the notice required by the 6th bye-law seems perfectly reasonable, and the deposit of the plans required under the circumstances was also reasonable. Therefore, as it seems to me, the bye-law with a penalty for disobedience must be the mode of carrying out the Act. Two cases were cited for the respondent. I confess I am quite unable to see what the reasons of the Court were. The first case, *Young* v. *Edwards* (1), was about two years before the other, *Hattersley* v. *Burr* (2), but it does not appear to have been cited in it, and in both it is simply said, per curiam, the bye-law is bad. These cases could not be carried to error, and unless we are quite satisfied with the decisions we must form the best independent opinion we can. Now it seems to me that, in the present case, the 6th bye-law was clearly within the provisions of the Act; and I do not agree with Mr. Herschell that because, independently of this bye-law, there was also another bye-law giving a direct and appropriate remedy by pulling the building down, this bye-law, which imposes a penalty for not giving previous notice and depositing plans, should be ultra vires or unreasonable.

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LUSH, J. I am of the same opinion. I should not entertain the slightest difficulty were it not for the two cases cited. It seems to me, on reading the Acts, that the bye-law was clearly within the powers conferred by s. 34 of 21 & 22 Vict. c. 98. Sect. 53 of the previous Act (11 & 12 Vict. c. 63) prescribed fourteen days as the time for giving notice to the local board, together with particulars, before beginning to dig the foundations of a new building, and forbade the beginning to build until the particulars had been approved by the board, under a penalty of 50*l*. Section 72 had similar provisions as to notice, &c., before beginning to lay out a new street, with a continuing penalty of 20*l*. a day. These sections were repealed by s. 34 of the second Act (21 & 22 Vict. c. 98), which, in lieu of them, gives power to the local board to make bye-laws as to the same matters. So that, instead of a fixed notice and penalties, the legislature leaves it to the discretion of the local board; and further, the section gives them express power as to giving notices, and though it says nothing as to penalties, it necessarily gives what the common law implies, namely, the power to enforce the bye-laws by penalties. I should have said, à priori, that the fourteen days' notice given by this bye-law would have been perfectly reasonable; and it is to be observed that it is the precise time limited by the repealed section of the first Act. Mr. Herschell contended that there was no power to impose a penalty. But a bye-law could only be enforced in this way. In 2 Kyd on Corporations, p. 156, it is said: "To secure obedience to a bye-law, it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the bye-law will be nugatory. The only penalty permitted by the law of England is a pecuniary one, though either that may be recovered by action, or the payment of it enforced by distress of the offender's goods. That obedience to a bye-law cannot be enforced by imprisonment of the offender or by the forfeiture of his goods there are a multitude of authorities; and the reason assigned is, that these are both against Magna Charta." The board, therefore, could not have enforced this bye-law by pulling down the building, but, by necessary implication, a power to make a bye-law implies the power of enforcing it by pecuniary penalty; and then, by a subsequent bye-law, power is also expressly given in

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certain cases to pull down the building. This bye-law, therefore, I should have said, was perfectly reasonable and entirely conformable to the statute but for the two cases which have been cited. As to them, I agree with my Brother Mellor, that we are bound to exercise our own judgment in the matter, when there are no reasons given, or those given are unintelligible. In the first case, *Young* v. *Edwards* (1), the bye-law is certainly very comprehensive, and the Court said it was bad without giving any reasons; but it would not be difficult to point out that there were parts of it which were not justified. In *Hattersley* v. *Burr* (2) the former case was not cited; and although there is no judgment, there are some dicta of the judges reported in the latter case which seem to shew the reason of the Court holding the bye-law unreasonable. It required that a month's notice should be given to the surveyor at one of the monthly meetings, so that two months might elapse without the intending builder being able to do anything. I cannot help thinking that the Court thought that unreasonable. Channell, B., observes, towards the end of the argument: "The argument for the respondents must go to this extent, that a man is liable to a penalty of 5*l.* for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the bye-laws." And certainly a bye-law which might prevent a man doing anything for two months I should say was unreasonable. Here the length of notice is only fourteen days, which was the very limit prescribed by the first Act. I am therefore unable to see an excess of authority in the passing of this 6th bye-law.

QUAIN, J. I am of the same opinion. I think this a good bye-law, neither ultra vires nor unreasonable. I should have no hesitation in saying so but for the two cases cited; as, however, no grounds for their decision are given by the Court in either of them, I am unable to say whether our present decision is in conflict with those cases. I do not see that any part of this bye-law is bad. The provision requiring fourteen days' notice is reasonable, and it is clearly lawful to impose a reasonable penalty. But it is also clear on the authorities that a bye-law may be good in part

(1) 33 L. J. (M.C.) 227. (2) 4 H. & C. 523.

and bad in part, provided the parts are separable: per Bayley, J., in *Clark* v. *Denton* (1); and there may have been reasons in the cases cited why the penalty was bad and unreasonable; but here it is 40*s.* only for each offence, and not a continuing penalty as in one of the cases cited. And, as my Brother Lush has said, the appropriate way of enforcing a bye-law is by imposing a reasonable pecuniary penalty for the breach of it. Then, had the local board power to make such a bye-law? By s. 34 express power is given; and the bye-law is within the very words of the section, and is not merely constructively, but literally, within the enactment. I am therefore entirely unable to see on what grounds we are to hold this bye-law bad: it is clearly neither beyond the powers of the Act nor unreasonable. Mr. Herschell made some objection, that imposing a penalty under the 6th bye-law was inconsistent with the power of pulling down the buildings given in the 36th bye-law. But the two seem to be perfectly consistent. In the one is a penalty for not giving the notice previous to the building; by the other, if the building turns out contrary to the bye-laws, it may be pulled down after it is built. The bye-laws provide for both, and both are reasonable provisions.

Case remitted to the Justices.

Attorneys for appellant: *Clarke, Rawlings, & Clarke.*
Attorney for respondent: *J. Scott, for Dale, South Shields.*

(1) 1 B. & Ad. at p. 95.

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THE ABERDARE LOCAL BOARD OF HEALTH, APPELLANTS; HAMMETT, RESPONDENT.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 13, *subs.* 5—"*Fabrication*" *of Voting Paper—Mens rea.*

At an election of a member of a local board of health, a voting paper (form sch. A to 11 & 12 Vict. c. 63) was delivered at the house of E. R., a voter; the wife of the voter, having her husband's authority, put a cross at the bottom of the paper, and the respondent then put E. R., the voter's initials, in the margin opposite the name of the candidate for which the vote was intended, and the respondent signed his name as witness to the mark of the voter. An information having been laid against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. (5), for "fabricating" the voting paper; the justices dismissed the summons, finding, on the above facts, that the respondent bonâ fide believed (as the fact was) that the wife had authority to put her husband's name to the paper, and that the respondent had no criminal or unlawful intention in putting his name as witnessing the mark of the voter:—

Held, that the justices were right: for that mens rea was necessary to constitute the offence.

CASE stated by justices of Glamorganshire under 21 & 22 Vict. c. 43.

At petty sessions held at Aberdare, on the 21st of October, 1873, an information, by the appellants against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. 5, charging that he did fabricate a certain voting paper, was heard. (1)

From the evidence it appeared that an election took place in August for a member to serve on the Board of Health. There were two candidates, Dr. Price and Mr. Howel Williams. Edward Richards was a person duly qualified to vote. Henry Davies was duly appointed to deliver the voting papers to qualified voters on the 22nd of August, and to collect them on the day of election, the 26th of August following.

On the 22nd of August a voting paper was left by the collector.

(1) By 21 & 22 Vict. c. 98, s. 13, subs. 5: "If any person fabricates, in whole or in part, alters, defaces, destroys, abstracts, or purloins any voting paper, or personates any person entitled to vote in pursuance of the Public Health Act, 1848, or this Act, or falsely assumes to act in the name or behalf of any person so entitled to vote, or interrupts the distribution of any voting papers, or distributes the same under a false pretence of being lawfully authorized so to do, he shall for every such offence be liable, on conviction before two justices, to be imprisoned for any period not exceeding three months, with or without hard labour."

at the house of Edward Richards, of which fact Richards was aware. On the following day, the 23rd of August, the respondent, with Williams, the candidate, called at the house of Edward Richards to canvas him for his vote on behalf of Williams. Richards was not at home; but his wife was, and upon being asked for her husband's vote in favour of Williams, she consented to give it, and made a + at the bottom of the voting paper; the respondent at the same time witnessed the mark of the wife, describing it as the mark of the voter, and affixed the initials of Edward Richards to the name of Howel Williams in the margin. (1)

Richards was aware that his wife had so signed the paper, as he swore upon the hearing of the information, "I leave such matters to her, and I did so this time as I have done many times before, because I think she is wise and capable enough to do it."

The respondent affixed his signature as witness to the mark of the wife, describing it as the mark of the voter, and the initials of Edward Richards in the margin, bonâ fide believing that she was entitled to sign on behalf of her husband, and that, in doing as he did, he was in no way acting contrary to the Act; and he left the voting paper open for the husband's inspection.

On the day of election, the 26th of August, the collector called at the house of Richards for the voting paper, but was told it had been mislaid, and no voting paper was either tendered or sent in on behalf of Edward Richards.

On the 27th of August, the day for counting up the votes, and when no additional voting papers could have been either tendered or received, a relation of one of the candidates induced Edward Richards to go down with the voting paper, which had been found, to the office of the Board of Health, where it was produced before the chairman, who was casting up the votes; but the voting paper was not admitted by the chairman, as it had not remained uncollected through the default of the chairman or person appointed to receive it: see 11 & 12 Vict. c. 63, s. 26.

(1) By s. 4 of 21 & 22 Vict. c. 98, this Act is to be deemed part of 11 & 12 Vict. c. 63. The voting paper was in the form given in sch. A of the latter Act; by which, if a voter cannot write, he must affix his mark, but such mark must be attested by a witness, and such witness must write the initials of the voter against the name of every person for whom the voter intends to vote.

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The justices were of opinion, that at the time the respondent so signed and attested the voting paper he bonâ fide believed that the wife had the authority of her husband to sign his name (which in point of fact she had); and that the respondent had no criminal or unlawful intention in witnessing her signature; and they therefore dismissed the summons.

The question for the Court was, whether the justices were bound to find the respondent guilty of fabricating the voting paper.

Pritchard, for the appellants. By s. 4, 20 & 21 Vict. c. 98, is to be deemed one with 11 & 12 Vict. c. 63; and the mode of filling up a voting paper is given in 11 & 12 Vict. c. 63, ss. 20–26, and form sch. A; and in order to be a valid voting paper it ought to have been filled up by the voter himself putting his name or mark; the paper, therefore, which the respondent was a party to filling up, was a false paper, and consequently he was guilty of fabricating a voting paper under 21 & 22 Vict. c. 98, s. 13, subs. 5.

[LUSH, J. This is made a criminal offence, subjecting the offender to imprisonment, possibly with hard labour, without the option of a fine; to constitute the offence there must be mens rea. The respondent believed, as was the fact, that the husband had authorized the wife to put his mark. Suppose the wife had put the mark when the husband was present, could it be contended that the respondent was guilty of fabricating the paper? On the findings of the magistrates, this is precisely the same case.]

The respondent might not have had a mens rea, but by attesting the wife's mark as that of the voter, and by putting the initials of the voter in the margin, he wilfully did or said what was not the fact, that the mark was the mark of the voter himself. The wilfulness of the act is sufficient, and a mistaken belief as to the lawfulness of the act does not prevent the act being wrong: *Foulger* v. *Steadman*. (1) In *Reg.* v. *Hartshorn* (2), which was an indictment for forgery at common law by affixing and attesting a person's mark under circumstances similar to the present, Crompton, J., stopped the case, saying: "This does not amount to forgery, although it is no doubt an irregular proceeding. It

(1) Law Rep. 8 Q. B. 65. (2) 6 Cox, C. C. 395, 402.

appears that the voting papers had been filled up by the defendants, either with the express or implied consent of the voters, or with the consent of some person whom the defendants might reasonably believe to have authority. The voters were all called upon. It is possible that the irregularity committed may be indictable, as it is clear the statute intended that the voter should affix his mark propriâ manu, but the attestation in the mode adopted is not forgery. There is no false statement implied, and the essence of the crime of forgery is making a false entry or signature, knowing it to be without authority and with intent to defraud." It was probably in consequence of this decision that this s. 13, subs. 5, was introduced. And the Act now gives a summary mode of proceeding to punish what Crompton, J., thought ought to be indictable in some way.

B. T. Williams, for the respondent, was not called upon.

MELLOR, J. I am of opinion that the magistrates were clearly right. In order to make a person liable for a criminal offence like this, he must have a guilty intention at the time he does the act; here the respondent thought he was doing nothing wrong, and believed that the wife had the authority of her husband, which she actually had, to put his name to the voting paper. The word "fabricate" occurs along with the words "alters, defaces, abstracts, or purloins any voting paper, or personates any person," all of which import a criminal intention—a mens rea; and the legislature must mean such an act as the person doing it must know is wrong, and not such as he believes to be right. There might have been facts which might have induced the magistrates to find the mens rea; but here they have found the contrary, and not only that the respondent believed the wife had authority, but that she had the authority of her husband to sign the voting paper for him.

LUSH, J. I am of the same opinion. We are not called upon to say whether the voting paper, if received in time, ought or ought not to have been admitted. The question is simply whether the respondent "fabricated it in whole or in part." The word "fabricates" imports a wrongful act, an act done with a mens rea, which is conclusively negatived by the justices.

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QUAIN, J. I am of the same opinion. "Fabricate" implies fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong and contrary to the Act.

Judgment for the respondent.

Attorneys for appellants: *Rickard & Walker, for Gery, Aberdare.*

Attorneys for respondent: *Purkis & Perry, for Phillips, Aberdare.*

Jan. 16. THE QUEEN ON THE PROSECUTION OF HER MAJESTY'S SECRETARY OF STATE FOR THE HOME DEPARTMENT *v.* THE VISITING JUSTICES OF THE COUNTY PRISON OF LEWES, IN THE COUNTY OF SUSSEX.

Criminal Lunatic, Inquiry as to the last legal Settlement of—By whom Inquiry to be made—3 & 4 Vict. c. 54, s. 2—The Prison Act, 1865 (28 & 29 *Vict. c.* 126), *s.* 66.

By s. 1 of 3 & 4 Vict. c. 54, "If any person, while imprisoned in any prison under any sentence of death, shall appear to be insane, it shall be lawful for any two justices of the peace of the county or place where such person is imprisoned to inquire as to the sanity of such person." By s. 2, "In all such cases as aforesaid it shall be lawful for such two justices or any other two justices of the peace of the county or place where such person is imprisoned to inquire into and ascertain the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and make an order, if necessary, for the maintenance." By s. 1 of 27 & 28 Vict. c. 29, s. 1 of 3 & 4 Vict. c. 54 is repealed; and by s. 2 the secretary of state may himself direct an inquiry as to sanity. By s. 66 of 28 & 29 Vict. c. 126, "Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, and the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the receiving authority shall for all purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes according to the tenor of the contract, be deemed to be the prison of the contracting authority."

The council of the borough of B., under s. 31 of the Prison Act, 1865 (28 & 29 Vict. c. 126), entered into a contract with the justices of the county of S. for the receipt and maintenance in the county gaol at L. of all prisoners maintainable at the expense of the borough of B. E. was committed to the gaol at L. under a warrant of a magistrate of B. to take her trial upon a charge of murder committed within the limits of the borough, and was afterwards found

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guilty and sentenced to death, and was received and maintained in the county prison at L. under the contract; and while she was so imprisoned she became insane:—

Held, that the justices of S. were the justices to make inquiry into the sanity, &c., of E., under s. 2 of 3 & 4 Vict. c. 54, as they were the justices of the county or place where E. was imprisoned; and that the gaol at L., though the prison of the council of B. within the meaning of s. 66 of 28 & 29 Vict. c. 126, could not be said to be within B.; and the justices of B. had therefore no jurisdiction.

MANDAMUS, directed to the visiting justices of the county prison of Lewes, in the county of Sussex (1), recited that by warrant under the royal sign manual the Broadmoor criminal lunatic asylum was appointed to be an asylum for criminal lunatics under 23 & 24 Vict. c. 75. By a charter of incorporation, dated 1854, the powers and provisions of 5 & 6 Wm. 4, c. 76, were extended to the inhabitants of Brighton; and by letters patent, dated 1854, a separate court of quarter sessions was granted to the borough of Brighton pursuant to the provisions of that Act. One Christiana Edmunds, at the Central Criminal Court in London, was found guilty of murder committed within the limits of the borough of Brighton, and was sentenced to death. While under sentence of death she was received into and imprisoned and maintained in the county prison at Lewes, in the county of Sussex, being a prison to which visiting justices are appointed, under a contract, entered into in pursuance of s. 31 of the Prison Act, 1865 (28 & 29 Vict. c. 126), between the clerk of the peace for and on behalf of the justices of the eastern division of the county of Sussex, and the mayor, &c., of the borough of Brighton, by their council; and while so confined in such prison under such sentence it was made to appear to the secretary of state that Christiana Edmunds was then insane, and thereupon the secretary of state, under 27 & 28 Vict. c. 29, s. 2, appointed two physicians to inquire into the sanity of Christiana Edmunds; and on such inquiry she was found to be insane, and the fact was duly certified in writing to the secretary of state, and the secretary of state directed by warrant

(1) On the Court inquiring why the mandamus was directed to the visiting justices of the county prison, counsel answered that the parties did not wish to raise any objection as to whom the writ should be directed to, as they were desirous of having the judgment of the Court on the substantial question raised by the return.

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under his hand that Christiana Edmunds should be removed to, and she has accordingly been removed to, the Broadmooor criminal lunatic asylum, and is now maintained as insane therein: and that the secretary of state required the said justices to inquire into and ascertain of the personal legal disability of Christiana Edmunds, the place of her last legal settlement, and her pecuniary circumstances: and if it should not appear that she was possessed of sufficient property which could be applied to her maintenance, to direct the overseers of the parish where they should adjudge Christiana Edmunds to be lawfully settled, or in case such parish should be comprised in a union, then the guardians of such union or of such parish, as the case may be, to pay on behalf of such parish all reasonable charges for inquiring into her insanity and for conveying her to Broadmoor lunatic asylum, and such weekly sum as the justices should direct for her maintenance in the asylum in which she was confined; and if the last place of settlement of Christiana Edmunds could not be ascertained, to make such order as is in that case made and provided by s. 2 of 3 & 4 Vict. c. 54; but if it should appear that Christiana Edmunds was possessed of property, to make such further or other order and to take all such lawful steps as are in that case directed by the statute in such case made and provided.

The mandamus then alleged a refusal of the justices to comply with the requisition, and commanded them to inquire into and ascertain the place of the last legal settlement and the pecuniary circumstances of Christiana Edmunds, and make all such orders for the payment of all reasonable charges for her maintenance in the asylum, as is provided by s. 2 of 3 & 4 Vict. c. 54.

Return, that the council of the borough of Brighton are a prison authority within the meaning of the Prison Act, 1865 (28 & 29 Vict. c. 126), and were so at the time of making the contract in the writ mentioned. The justices of the peace in and for the eastern division of the county of Sussex are also a prison authority within the meaning of the same Act, and were so at the time of the making of the contract, and the county gaol at Lewes was and is their prison within the meaning of the same Act. In conformity with s. 31 of the Act, the council of the borough of Brighton on the 16th of October, 1867, entered into a contract with the

justices for the receival [sic] and maintenance in the gaol at Lewes of all persons maintainable at the expense of the borough of Brighton, such contract to continue in force for fifty years from the 1st of January, 1868. The contract is the contract in the writ mentioned. Christiana Edmunds was, after the making of the contract, committed to the gaol under a warrant of the deputy stipendiary magistrate in and for the borough of Brighton to take her trial upon a charge of attempting to murder E. Beard within the limits of the borough of Brighton. At the Sussex winter assizes, held on the 21st of December, 1871, an indictment for the murder of S. A. Parker and other indictments for attempts to murder other persons were preferred before the grand jury, and true bills thereupon found: all the offences charged in such indictments were alleged to have happened within the limits of the borough of Brighton. Christiana Edmunds was tried at the Central Criminal Court upon the indictment for murder committed within the limits of the borough of Brighton so found as aforesaid, and was found guilty, and was sentenced to death. While under such sentence of death Christiana Edmunds was received into, and imprisoned and maintained in, the county prison at Lewes, under the contract between the council of the borough of Brighton and the justices of the eastern division of the county of Sussex; and while she was so imprisoned and maintained it was made to appear to the secretary of state that she was insane, and having been so found upon inquiry by two physicians, she was removed to Broadmoor lunatic asylum. Afterwards the requisition in the writ mentioned was made to them by the secretary of state requiring them to inquire into the place of the last legal settlement and pecuniary circumstances of Christiana Edmunds, and otherwise to do the acts and make the orders in the requisition mentioned. They were advised that, although at the time when Christiana Edmunds was so removed to Broadmoor she was actually imprisoned within the county gaol of Lewes, of which they are visiting justices, yet, having regard to the provisions of the Prison Act, 1865, ss. 57 & 66, and other statutes in such case made and provided, she was constructively and in contemplation of law imprisoned within the prison of the council of the borough of Brighton, and not within the prison of the justices of the eastern division of

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Sussex; and that any requisition as in the writ mentioned, if made at law, should, pursuant to 3 & 4 Vict. c. 54, 23 & 24 Vict. c. 75, 27 & 28 Vict. c. 29, and the Prison Act, 1865 (28 & 29 Vict. c. 126), have been made to such council or to two justices in and for such borough, and could not be lawfully made to them, and that they were not bound to comply with the requisition.

Demurrer and joinder in demurrer.

Sir J. Holker, S.G. (*C. Bowen* with him) in support of the demurrer. The question is whether the requisition of the home secretary ought to have been made to the justices of the borough of Brighton or to the justices of Sussex. The prosecutors contend it was rightly made to the justices of the county. By s. 1 of 3 & 4 Vict. c. 54, if any person imprisoned in any prison under sentence of death shall appear to be insane, it shall be lawful "for any two justices of the peace of the county . . . or place where such person is imprisoned," to inquire as to the sanity of such person, and if such person is found to be insane, the secretary of state is to order his removal to a lunatic asylum. That section is repealed by 27 & 28 Vict. c. 29; and by s. 2 of that Act the secretary of state may himself cause the inquiry to be made. Although s. 1 of 3 & 4 Vict. c. 54 is repealed, it is still necessary to refer to that section in construing s. 2 of 3 & 4 Vict. c. 54, as the question before the Court turns on the words of that section. By s. 2, "In all such cases as aforesaid . . . it shall be lawful for such two justices or any other two justices of the peace of the county or place where such person is imprisoned, to inquire into and ascertain . . . of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person . . ." Who are "such two justices"? In order to ascertain that, reference must be made to s. 1. Those justices must be the two justices of the place where the person is confined. The statutes 27 & 28 Vict. c. 29, and 28 & 29 Vict. c. 126, were passed subsequently to the 3 & 4 Vict. c. 54, and the question is, who are the justices to make the inquiry when 3 & 4 Vict. c. 54 was passed? It is clear that the justices of Sussex are the persons who are to make it. The other side will contend that the justices of the borough of Brighton are the

proper persons to make this inquiry, and to support this argument reliance will be placed upon the Prison Act, 1865 (28 & 29 Vict. c. 126). By s. 5 the justices of Sussex and the council of Brighton are constituted prison authorities. By s. 31, "any prison authority may contract with any other prison authority . . . That the latter authority is to receive into and maintain in its prison all prisoners maintainable at the expense of the former authority. . ." And it is under that section that a contract has been made between the parties for the maintenance of the borough prisoners in Lewes gaol. By s. 57, "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." That section can have no application to this case: it means that where it happens that a prison for the county is situate within a borough, the prison shall be deemed to be within the county. Section 66 appears at first sight to be most pertinent to the argument on the other side. By that section, "Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, that the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the receiving authority shall, for all purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes according to the tenor of the contract, be deemed to be the prison of the contracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority." That section however has no application. The purposes for which the prison of the receiving authority is to be deemed to be the prison of the contracting authority, is defined to be "of and incidental to the commitment, trial, detention, and punishment of prisoners." Those words do not include the costs of maintenance of a lunatic prisoner in an asylum. The question therefore comes back to s. 2 of 3 & 4 Vict. c. 54. What is the meaning of the words "such two justices"? It clearly means the justices of the place where the prisoner is confined: they are the justices of Sussex, the place where the gaol is situate.

Cohen, Q.C. (*Lumley Smith* with him) contrà. The place where

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Edmunds was imprisoned, within the meaning of 3 & 4 Vict. c. 54, s. 2, must be deemed to have been the borough of Brighton and not the eastern division of the county of Sussex. The requisition of the secretary of state ought to have been made to the justices of Brighton, and not to the justices of Sussex. Although she was actually imprisoned in Lewes Gaol, she was constructively confined at Brighton. If this were not so, in the event of her having no settlement, or if her settlement could not be ascertained, the cost of her maintenance would have to be borne by the county of Sussex, and not by the borough of Brighton; and this would be most unfair to the county of Sussex, who are accommodating the borough of Brighton by receiving its prisoners. The case however is provided for by s. 66 of 28 & 29 Vict. c. 126, which says that the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, be deemed to be the prison of the contracting authority. Lewes Gaol must be deemed to be the prison of the borough of Brighton; and constructively the prisoner is imprisoned at Brighton, and the requisition of the secretary of state ought to have been made to the justices of Brighton.

[MELLOR, J. Why should not the cost of such maintenance be provided for in the contract between the parties? that would avoid all hardship.

Sir J. Holker, S.G., intimated that the costs of maintenance of criminal lunatics were provided for in the contract: that there was no doubt the prisoner was insane, and had been properly removed to Broadmoor Asylum; and that it appeared to him, so far as it related to the present case, to be immaterial which of the parties instituted the inquiry as to the prisoner's settlement.]

COCKBURN, C.J. I think it is clear with regard to criminal lunatics that, under 3 & 4 Vict. c. 54 and 27 & 28 Vict. c. 29, the case could not be said to be one in which the Brighton justices are entitled to interfere with the gaol in which the lunatic prisoner is confined. Then does s. 66 of 28 & 29 Vict. c. 126, meet the case? The words of that section are, "the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners

of the contracting authority, or any of such purposes according to the terms of the contract, be deemed to be the prison of the contracting authority." I do not think that this is a case which comes within those words. That section no doubt was framed to meet a difficulty and supply a remedy, and at first I thought that the legislature had overlooked this case; but when one comes to recollect that all those matters depend upon the contract between the two authorities, and that a case of this kind might well be provided for under that contract, and in point of fact has been provided for, one sees that, although there has been no legislative enactment upon the subject, yet the parties have a remedy by the terms under which they have contracted. Therefore there is no necessity in this case, even if public policy rendered it expedient to do so, to strain the words of s. 66. I do not think that these words are capable of the construction Mr. Cohen contends for.

MELLOR, J. I am of the same opinion. I think when we consider the meaning and effect of the words in s. 66 by the light of the fact that every separate jurisdiction must have a gaol or else must contract with some other prison authority for the reception and treatment of its prisoners, we must suppose that the legislature intended that it should have power to contract for all those purposes which would be essential to relieve it from the expense of maintaining a gaol of its own. When we look at it in that light, and then take s. 66, the only section which speaks of a contracting party, that is to say, the party who contracts for the reception of their prisoners, it is perfectly clear that they may contract for all the purposes for which their own prison would be useful or necessary, and that they have no authority in the management of it. Instead of the prisoners being imprisoned at Brighton they are imprisoned at Lewes, and the county of Sussex may, in their contract, provide for all the necessary and incidental expenses which would otherwise fall upon them.

QUAIN, J., concurred.

Judgment for the prosecution.

Attorneys for the prosecution: *Raven & Hare.*
Attorney for defendants: *Jones, Lewes.*

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ANGELL *v.* DUKE.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Interest in Land—Collateral Agreement.*

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Declaration that the plaintiff and defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage, together with the use of the furniture therein, and the plaintiff objected to become tenant on the ground that the messuage was in imperfect repair and insufficiently furnished; that the defendant, in order to induce, as he in fact did thereby induce, the defendant to become forthwith tenant to him of the messuage without requiring the defendant to do any repairs or sending additional furniture into the same previously to the creation of the tenancy, verbally promised the plaintiff that he would within a reasonable time after the creation of the tenancy do such repairs and send additional furniture into the messuage; and thereupon, afterwards, in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage without requiring the defendant to do any such repairs or to send into the messuage any such additional furniture, the defendant promised the plaintiff that he would, within a reasonable time, do such repairs and send such additional furniture into the messuage. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise:—

Held, on demurrer, that the agreement declared on did not relate to an interest in land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3); and an action could be maintained upon it though not in writing.

Declaration that, before the making of the agreement hereinafter mentioned, the plaintiff and the defendant had been negotiating with each other for the letting by the defendant to the plaintiff, upon certain terms prepared by the defendant, of a certain messuage and premises, together with the use of the furniture and effects then being thereon, as for a furnished house, and the plaintiff had then objected to become tenant to the defendant of the messuage and premises upon the said terms upon the ground that the messuage and premises were then in imperfect order and repair, and insufficiently furnished for the purposes of convenient and comfortable use, occupation, and enjoyment thereof by the plaintiff and his family; and the defendant then, in order thereby to induce, as he in fact did thereby induce, the defendant to become forthwith tenant to him of the messuage and premises upon the said terms without requiring the defendant to do any works or repairs or send any additional furniture or effects into the same previously to the commencement and creation of such tenancy,

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verbally promised the plaintiff that he, the defendant, would, within a reasonable time after such creation and commencement of such tenancy, do such works and repairs and send such additional furniture into the messuage and premises as might be necessary for completing the condition and furnishing of the same for the purposes of such convenient use, occupation, and enjoyment of the same; and thereupon, afterwards, in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage and premises upon the terms aforesaid without requiring the defendant, previously to the plaintiff so becoming such tenant, to do any such works or repairs, or send into the messuage or premises any such additional furniture and effects as respectively aforesaid, the defendant promised the plaintiff that he would, within a reasonable time, do such works and repairs and send such additional furniture and effects into the messuage and premises as might be found and be necessary for completing the condition and furnishing of the same for the purposes of the convenient use, occupation, and enjoyment of the same by the plaintiff and his family. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise.

Demurrer and joinder in demurrer.

Maurice Powell, in support of the demurrer. The agreement set out in the declaration relates to an interest in or concerning land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3), and no action therefore can be brought on the agreement unless it be in writing. In *Mechelen* v. *Wallace* (1) an agreement that if the plaintiff would take possession of a house partly furnished, and become tenant on its being completely furnished, the defendant would send into the house all the furniture necessary to furnish it completely, was held to be an agreement for an interest in land. So in *Cocking* v. *Ward* (2), an agreement between the plaintiff, who was tenant of a farm, and defendant, that if the plaintiff would surrender the tenancy and prevail on his landlord to accept the defendant as tenant the defendant would pay the plaintiff 100*l*., was held to be a contract relating to an interest in land within the

(1) 7 Ad. & E. 49. (2) 1 C. B. 858; 15 L. J. (C.P.) 245.

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statute. *Cocking* v. *Ward* (1) was followed in *Kelly* v. *Webster* (2), and approved in *Hodgson* v. *Johnson*. (3)

[LUSH, J. *Morgan* v. *Griffith* (4) is an authority adverse to the plaintiff's contention.]

In *Morgan* v. *Griffith* (4) the Court held that a verbal agreement by the landlord to destroy rabbits was collateral to the lease under which the defendant took his farm; but that case, as well as *Mann* v. *Nunn* (5), is in conflict with the previous decisions. In the present case the consideration for the promise to do the repairs and send furniture into the house is that the defendant would become tenant of the house. The consideration cannot be severed from the promise; the agreement is one entire contract, and relates to an interest in land within s. 4 of the Statute of Frauds.

Hollings, contrà. The agreement to do the repairs and send furniture into the house is collateral to the plaintiff becoming tenant to the defendant, and it is not an agreement in any way relating to an interest in land, and need not be in writing. It is impossible to distinguish this case from *Morgan* v. *Griffith*. (4) In that case, which was an appeal from the decision of a county court, the respondent agreed to take a lease of certain land which he was to execute at a future time. He entered on the land and found it overrun with rabbits; on the lease being tendered, he refused to execute it unless the rabbits were destroyed; the appellant declined to put a term to that effect into the lease, but promised that the rabbits should be destroyed; the respondent then executed the lease; the appellant failed to destroy the rabbits, and the respondent sued him for breach of his promise. The county court judge admitted evidence of the parol agreement, and the Court of Exchequer decided that the parol agreement was collateral to the written lease, and had been properly admitted. So here the agreement to repair the house and furnish it is collateral, and is in no way connected with an interest in land.

Powell was heard in reply.

(1) 1 C. B. 858; 15 L. J. (C.P.) 245.
(2) 12 C. B. 283; 21 L. J. (C.P.) 88.
(3) E. B. & E. 685; 28 L. J. (Q.B.) 163.
(4) Law Rep. 6 Ex. 70.
(5) 43 L. J. (C.P.) 241.

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COCKBURN, C.J. I am of opinion that our judgment should be for the plaintiff. I think this case is undistinguishable from *Morgan* v. *Griffith* (1); but independently of that authority, I think, on principle, this is not an agreement within the Statute of Frauds. We must see what the true history of the transaction is, and, of course, the sequence of events. The parties are in negotiation respecting a lease to be granted by the defendant to the plaintiff. The plaintiff objects; he is not satisfied with the condition of the house; and the defendant says to him, "If you will become my tenant," which evidently refers to something to take place afterwards: "I will undertake to put the house in repair, and send more furniture into it." That is something antecedent to the agreement to transfer the interest in the land by a lease from the defendant to the plaintiff, and altogether, to my mind, collateral to it. The agreement for a transfer of the interest in land or the house is posterior. "You having agreed with me that if I agree to become your tenant you will do so and so, I now in consideration of your letting the premises to me, agree to become your tenant;" that would be a contract which has reference to the transfer of an interest in the land. The other is something antecedent and collateral to that contract, that is, a separate agreement entered into in order to induce the intended tenant to accept the tenancy. It seems to me, therefore, that the principle in *Morgan* v. *Griffith* (1) is right, and on that ground I think that this is not a case within the statute, and, consequently, our judgment must be in favour of the plaintiff.

MELLOR, J. I confess I have not been free from doubt upon the question, but upon the whole I have come to the conclusion that this is a collateral agreement to the demise, and it was not part of an agreement between the parties for an interest in land. The terms offered by the defendant were: "If you should become my tenant of this house I will put the house in repair, and supply it with furniture." These terms did not bind the plaintiff to become tenant, and he did not become tenant under them; but when he did become tenant, the defendant was bound to carry out the terms he offered to the plaintiff. It appears to me to be a

(1) Law Rep. 6 Ex. 70.

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collateral arrangement with regard to the supply of the furniture and repairs, and not within the Statute of Frauds.

LUSH, J. I am of the same opinion. The question is, whether the agreement set out in the declaration, which we must assume to be made in the terms alleged, is an agreement within s. 4 of the Statute of Frauds (29 Car. 2, c. 3). That section says:—"That no action shall be brought whereby to charge any person . . . upon any contract or sale of lands, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing." Now, does this declaration set out any contract or sale of land, or any interest in or concerning land? I quite agree, if the contract alleged is a contract containing any material term which amounts to a sale of an interest in land, then all the other terms subordinate to it must stand or fall with it. Now, what is alleged here is: [The learned judge read the declaration.] If it had been a part of the terms that the defendant agreed to let, or the plaintiff agreed to take, I quite agree the whole would have been void, as not being in writing; but there is no such statement. This promise was made as an inducement to the plaintiff to enter into the arrangement. It is collateral, and therefore I do not see, if the plaintiff had refused to become tenant, or the defendant had refused to let him the house, that either would have had a cause of action against the other. The defendant says, in order to induce the plaintiff to complete the tenancy: "When you have become tenant I will put the house in repair and bring in the furniture." No obligation arose until the consideration had been executed by the plaintiff entering and becoming tenant. It seems entirely analogous to *Morgan* v. *Griffith* (1), which I think well decided. Our decision apparently conflicts with that in *Cocking* v. *Ward* (2) and *Mechelen* v. *Wallace.* (3) But it is to be observed that in *Cocking* v. *Ward* (2) the Court construed the agreement as an agreement for the surrender of the premises, and therefore one clearly within the Statute of Frauds. Whether they were right in that is not the question; but so it was construed, that the plaintiff

(1) Law Rep. 6 Ex. 70. (2) 1 C. B. 858; 15 L. J. (C.P.) 245.
(3) 7 Ad. & E. 49.

had bound himself to surrender the premises to the defendant, and therefore entered into a contract that was void for not being in writing. I cannot agree, that on the statements in this declaration, there was any agreement, that the one bound himself to let, and the other to take; and all the defendant is alleged to have said is: "If you become tenant I will repair the house and bring in the furniture." This is certainly not a contract or sale of any interest in or concerning land.

ARCHIBALD, J. I am entirely of the same opinion. I quite agree, if any part of the contract sued upon was an agreement for an interest in or concerning land, it would be within the Statute of Frauds and require to be in writing; but it seems to me the substance of the contract as set out in the declaration is: "If you choose hereafter to become tenant, I now agree I will do the repairs and send in the furniture." There is no contract binding the plaintiff to become tenant at all. It is only in the event of his doing that on which the stipulation to do repairs and send in the furniture depends, that the promise becomes binding. Although that involves the entering into the agreement for a tenancy, yet it does not involve any agreement relating to an interest in and concerning land at a time when the promise that is the subject of this action is entered into. It is left entirely voluntary on the part of the plaintiff to become tenant or not, and though when he does become tenant the defendant is bound to do the repairs and send in the furniture, that is collateral to any interest in land; and I think, for these reasons, the agreement does not require to be in writing.

Judgment for the plaintiff.

Attorney for plaintiff: *John Pullen.*
Attorney for defendant: *G. Thompson Powell.*

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Jan. 19.

THE COMMISSIONERS FOR IMPROVING THE TOWN AND PARISH OF WALTON ON-THE-NAZE *v.* WALFORD.

Public Health Act, 1872 (35 & 36 *Vict. c.* 79), *s.* 43—*Rate for sanitary Purposes —Limit of Rate under local Act.*

By s. 230 of 4 & 5 Vict. c. lxx., a local Act for the town of W., in order to raise money to pay interest of money to be borrowed, and for carrying out the purposes of the Act, the commissioners are empowered to make a rate "upon the several owners, proprietors, lessees, and occupiers of all houses, mills, shops, warehouses, coach-houses, stables, cellars, buildings, gardens, lands, tenements, hereditaments, and premises whatsoever within the limits of the Act . . . so as such rates do not exceed in any one year the sum of 2*s.* 6*d.* in the pound." By s. 234 no person shall be rated on account of any arable, meadow, or pasture land exceeding two acres, excepting as is specially provided for in the Act, or of the farmhouses and buildings used exclusively for farming purposes.

By s. 16 of the Public Heath Act, 1872 (35 & 36 Vict. c. 79), all expenses incurred or payable by an urban sanitary authority, under the Sanitary Acts shall, . . . if the Local Government Acts were not in force at or immediately before the passing of this Act, be defrayed . . . in the case of improvement commissioners out of any rate, in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district. By s. 43 any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes.

The Local Government Acts were not in force in the town of W. before the passing of the Public Health Act, 1872. The plaintiffs, as the urban sanitary authority for the town, under 4 & 5 Vict. c. lxx. and the Public Health Act, 1872, levied a rate at 1*s.* 6*d.* in the pound upon all messuages, lands, tenements, and hereditaments throughout the town for the purposes of defraying the expenses of the urban sanitary authority:—

Held, that "limit" in s. 43 of the Public Health Act, 1872, ought not to be construed to mean exemption; and that a rate could not be imposed on any one person on account of lands exceeding two acres, nor of farmhouses and buildings used exclusively for farm purposes.

Special case stated without pleadings.

By 4 & 5 Vict. c. lxx., an Act to authorize and provide for certain improvements in the town and parish of Walton-le-Soken, otherwise Walton-on-the-Naze, in the county of Essex, the vicar and curates of the town of Walton, the incumbent of the parish of the Holy Trinity at Colchester, the lord of the manor of Walton, and the churchwardens, overseers of the poor, and surveyors of the highways of the town for the time being, together with certain persons therein named, and every person who should

be assessed to the improvement rate at the yearly rent of 50*l.* and upwards, and who should have paid such rate, were appointed commissioners for putting the Act into execution. The Act contained, amongst other general provisions, powers as to sea defences, sewers, drains, streets, causeways, and nuisances.

By s. 230, "In order to raise money to pay the interest of the money to be borrowed, and other expenses and outlay for carrying the several purposes of this Act into execution, the commissioners are at their first meeting, or any adjournment thereof, and also twice in every year, to be computed from the 31st of December last past, and in every succeeding year, or when and as often as they shall think it advisable or necessary, to make one or more equal assessments or rates, to be signed by the commissioners, or any three of them, assembled at any general, special, or adjourned meeting, upon the several owners, proprietors, lessees, and occupiers of all houses, mills, shops, warehouses, coach-houses, stables, cellars, buildings, gardens, lands, tenements, hereditaments, and premises whatsoever within the limits of this Act, according to the annual value of the same, so as such rates or assessments do not exceed in any one year, to be computed as aforesaid, the sum of 2*s.* 6*d.* in the pound on such annual value, except as herein provided, and, unless it shall be otherwise ordered by the commissioners, such rates shall be made at the quarterly meetings in the months of May and August in every year."

By s. 234, "No person shall be rated in pursuance of the Act on account of any arable, meadow, or pasture land exceeding two acres, excepting as is specially provided for in the Act, or of any tithes, or composition in lieu of tithes, within the limits of the said Act, or the farmhouses and buildings used exclusively for farming purposes."

By s. 278, this Act shall be applicable to, and be put in force for, the improvement of the town and all other parts of the parish of Walton.

Walton-on-the-Naze is a parish on the east coast, containing about 2386 statute acres. During the last fifty years it has been enlarged and altered from an agricultural parish with a few farmhouses and cottages to a watering-place, to which in the season visitors resort, but which is in the winter deserted, and the ordinary population of the whole parish is about 1200.

For a long time the Act continued to be practically unused, but in 1868 the commissioners appointed a clerk, and devised and have carried out a system of drainage, and to enable them to do the same have borrowed moneys under the Act, and, in order to pay the interest thereon and to defray the expenses they were put to, have levied assessments and rates in the manner by the Act authorized, but no rate made down to the passing of the Public Health Act, 1872, exceeded 1*s.* 6*d.* in the pound.

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Down to the passing of the Public Health Act, 1872 (35 & 36 Vict. c. 79, s. 4) the Local Government Acts had never been nor have they since been adopted by the commissioners, and no part of the district under the Local Act had or has any part of its area been situate within a borough or local government district.

It is contended on behalf of the plaintiffs, that by the Public Health Act, 1872, the town and parish of Walton-on-the-Naze was constituted an urban sanitary district, and that the commissioners became and were constituted and are the urban sanitary authority, and the commissioners, acting on this assumption, held a meeting as such authority in accordance with s. 6 of the Act upon the 11th of September, 1872.

Since the last-mentioned date the commissioners have appointed a medical officer of health and an inspector of nuisances, and claimed to act and to be an urban sanitary authority within the meaning of the said Acts.

By s. 7 of the Public Health Act, 1872, "subject to the provisions of this Act, the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act there shall be transferred and attach to an urban sanitary authority, to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities, and obligations within such district exercisable or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilization Acts, and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Acts, the Artizans' and Labourers' Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts, or any Acts amending such Acts."

By s. 10 it shall be the duty of every urban sanitary authority to appoint a medical officer of health, being a legally qualified medical practitioner.

By s. 16, all expenses incurred or payable by an urban sanitary authority under the Sanitary Acts, shall, if the Local Government Acts or the provisions of those Acts with respect to rating were at or immediately before the passing of this Act in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts, and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that is to say: 1. In the case of the council of a borough out of the borough fund or borough rate. 2. In the case of improvement commissioners out of any rate in the nature of a general rate leviable by them as such commissioners throughout the whole of their districts. Provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paving, sweering, or other sanitary purposes, all expenses incurred by such authority in

the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates, except where, at the time of the passing of this Act, any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable.

By s. 25, "After the passing of this Act, the Local Government Acts shall not nor shall any provision thereof be adopted in or by any place without the consent of the Local Government Board, and it shall be lawful for a rural sanitary authority with the consent of the Local Government Board, but not otherwise, to constitute any portion of the area within its jurisdiction a special drainage district, and thereupon such area shall become a separate contributory place."

By s. 33, "The Local Government Board may on the application of the sanitary authority of any district by provisional order wholly or partially repeal, alter, or amend any Local Acts other than Acts for the conservancy of rivers in force in such district, and not conferring powers or privileges upon corporations, companies, undertakers, or individuals for their own pecuniary benefit, which relate to the same subject-matters as the Sanitary Acts."

By s. 43, any limit imposed on or in respect of any rate by any Local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes.

By s. 59, all powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not passed.

At a special meeting of the improvement commissioners, duly held on the 9th of September, 1873, the plaintiffs, assuming to act as the urban sanitary authority of the district, levied a rate of 1*s.* 6*d.* in the pound upon all messuages, lands, tenements, and hereditaments in and throughout the town and all other parts of the parish of Walton, for the purposes of defraying the expenses specified in an estimate made on the 27th of August, 1873.

The rate was as follows: a rate levied by the commissioners for improving the town and parish of Walton, as the urban sanitary authority of and for the town and all other parts of the said parish of Walton, under 4 & 5 Vict. c. lxx., and under the Public Health Act, 1872 (35 & 36 Vict. c. 79), and all the Acts incorporated with the Public Health Act, 1872, upon all messuages, lands, tenements, and hereditaments in and throughout the town, and all other parts of the parish of Walton legally chargeable therewith, for the purposes of defraying all the expenses of such urban sanitary authority in the performance of its duties under the sanitary Acts at the sum of 1*s.* 6*d.* in the pound.

In making the assessment for this rate the plaintiffs advisedly assessed all rateable property within their limits at an equal rate

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according to the last assessment for the relief of the poor within their limits, and purposely did not restrict the rating of the arable, meadow, or pasture land held by any one occupier to a quantity not exceeding two acres. They also purposely included farm-houses and buildings used exclusively for farming purposes. At the same time that they made the before-mentioned rate or assessment the commissioners also made a special rate purporting to be under the aforesaid Walton Improvement Act, and to be made in order to raise money to pay the interest of the moneys borrowed and other expenses and outlay for carrying the several purposes of the said Act into execution, such last-mentioned expenses being limited to those alleged to be incurred specially under the said Walton Improvement Act. In making the last-mentioned or special rate the commissioners advisedly observed the provisions of s. 234 of the Walton Improvement Act, and rated no one for more than two acres of arable, meadow, or pasture land, and excluded farm-houses and buildings.

In the first-mentioned rate the defendant was rated in the sum of 32*l.* 17*s.* on account of arable, meadow, and pasture land exceeding two acres, not being land falling within the exception referred to in s. 234 of 4 & 5 Vict. c. 70, as specially provided for in the Act, and on account of farm-houses and buildings used exclusively for farming purposes; and it is to recover this sum that the present action is brought.

The defendant in respect of his occupation is rated in the special rate for land not exceeding two acres, and the farm-house and buildings are omitted.

The defendant contends that under the above circumstances he is not liable to be rated to the first-mentioned rate on account of his arable, meadow, or pasture land exceeding two acres, and not falling within the exception aforesaid, nor on account of his farmhouses or buildings used exclusively for farming purposes.

The plaintiffs insist that the defendant is liable to be rated and assessed to the first-mentioned rate, irrespective of any limit imposed by the Walton Improvement Act.

The question for the opinion of the Court was, whether the defendant is liable to be rated to the first-mentioned rate in the above manner, or whether the defendant's contention is correct.

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J. Brown, Q.C. (*Philbrick, Q.C.*, with him), for the plaintiffs. The question is, whether s. 234 of 4 & 5 Vict. c. lxx., is not repealed by s. 43 of 35 & 36 Vict. c. 79. Sections 230 and 234 impose a limit on the rates in respect of amount as well as in respect of the land on which they are to be levied. As long as Walton was a small town the policy of the legislature was that farm lands and buildings which derived no benefit from the improvement of the town should not be taxed for those improvements; but now that it has become a watering place it affords a ready market for all agricultural produce, and the owners and occupiers of farm lands derive a benefit from the improvement of the town, for the more salubrious the town is made, the greater the number of persons who will resort to it. The Public Health Act, 1872, has therefore increased the area of taxation; s. 16 provides that the expenses incurred by the sanitary authority shall, where the Local Government Acts were not in force at the time of the passing of that Act, be defrayed in the case of improvement commissioners out of any rate in the nature of a general rate, and s. 43 abolishes the limit imposed in respect of any rate by any local Act. It is admitted that the improvement commissioners are by s. 4 constituted an urban sanitary authority, and s. 60 defines sanitary purposes to mean any objects or purposes of the sanitary Acts. The rate in question, no doubt, is one made by the sanitary authority for sanitary purposes, and is to be levied without respect either as to amount or area, for the legislature contemplated that all limits imposed by local Acts should be repealed.

C. Bowen, for the defendant. The words of s. 43 are "any limit imposed on or in respect of any rate." The word "limit" is used in a sense different from "exemption," and is confined to the amount of the rate to be levied. The amount of the rate under the local Act was limited to 2*s.* 6*d.* in the pound; that limit is repealed by s. 43; but that section does not extend the power of rating to a new subject-matter and authorize a rate to be levied on land exceeding two acres or on farm buildings, things which never before were the subject of a rate. There are many cases in which, where the legislature intended to extend the

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area of rating, apt words have been used: *Tait* v. *Local Board of Health of Carlisle* (1); *Luscombe* v. *Local Board of Health of Plymouth.* (2)

J. Brown, Q.C., in reply.

BLACKBURN, J. I own that I entertain no doubt as to the construction to be put on s. 43 of 35 & 36 Vict. c. 79. I entertain no doubt that the legislature have not said, that the owners of land exceeding two acres and of buildings used exclusively for farming purposes, who formerly were not liable to a rate for sanitary purposes, shall in future be liable to pay it. The question turns upon 35 & 36 Vict. c. 79. By s. 16 of that Act all expenses incurred by an urban sanitary authority shall, if the local government Acts are in force beforehand, be paid for by rates to be levied under those Acts. That provision does not apply to this case. The section then provides that if the Local Government Acts were not in force at the time of the passing of those Acts, then in the case of the council of a borough the expenses are to be paid out of the borough fund; and in the case of improvement commissioners, which is the case we now have before us, out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district. Then there follows a proviso which is, I must say, not intelligible, and which has been explained by a subsequent Act, 37 & 38 Vict. c. 39, s. 8, in a way that I have not thoroughly understood, except so far as to see that that which is declared by that Act does not affect the present case. Then comes s. 43, which says that any limit imposed on or in respect of any rate by any local improvement Act shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes. Now, in the present case, the local authority, before the Local Government Acts were in force, had power to impose a rate upon the occupiers of all real property within their district. That power is given by s. 230 of 4 & 5 Vict. c. lxx., which, however, limits the amount of the rate to be levied; it enacts that the rates shall not exceed in any one year the sum of 2*s.* 6*d.* in the

(1) 2 E. & B. 492. 16 Jan 3/4 (2) 27 L. J. (M.C.) 299. 4 Jan 1858

pound. I think the legislature have in effect repealed that limit. I think the word "limit" in s. 43 of 35 & 36 Vict. c. 79, is properly applicable to the amount of the rate; it enacts that that limit shall no longer be in force, but that the rate may be levied as high as 5*s.* or 10*s.* in the pound in the course of any one year. But by s. 234 of the Local Act it is enacted that no one shall be rated on account of arable, meadow, or pasture land exceeding two acres, or the farmhouses and buildings used exclusively for farming purposes. Mr. Brown asks us to construe s. 43 of 35 & 36 Vict. c. 79, as imposing a fresh power of rating those things which the commissioners never had power to rate at all. If the legislature intended to say that land exceeding two acres or farmhouses and buildings used for farm purposes should be rated, they should have used words to shew such an intention; but, further, if the legislature intended to be indifferent as to what had been the arrangement beforehand, and it had said the rate shall be levied as under the general provisions of rates made under the Local Government Acts, that would have been intelligible; but the legislature says that the rate shall be levied under the old local rating, except that the limit shall be abolished. If it were intended that the rating should extend to fresh subjects, I cannot understand the words the legislature has used. But it is sufficient to say that no words are to be found which can, without improper straining, be construed as an intention on the part of the legislature to impose a fresh tax in respect of land exceeding two acres or farmhouses and buildings used for farm purposes, which formerly were not rateable at all. On these grounds I think the judgment of the Court must be in favour of the defendant.

MELLOR, J. I am of the same opinion. I concur in what my Brother Blackburn has said; and I would add only one further observation. I think the burden of shewing that the power to rate exists in the way the plaintiffs contend for lies on them, and I think they have entirely failed to make that out.

LUSH, J. I also am of the same opinion. This property was

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exempted from rating under the local Act; and I think, if the legislature had intended to impose the new duty, it ought to have said so in unambiguous terms.

Judgment for the defendant.

Attorney for plaintiffs: *T. S. Morris.*

Attorneys for defendant: *Woodroffe & Plaskett.*

Jan. 22.

FINLINSON *v.* PORTER AND ANOTHER.

Trespass—Grant of Drain—Power of Grantee to deepen—Easement.

By indenture, executed by both parties, defendant conveyed to plaintiff in fee certain land, "subject, nevertheless, to the joint-ownership and right to the use by the defendant and the owners and occupiers for the time being, of certain adjoining land, as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed, and the course and direction of which was delineated on a plan in the margin of the deed, and subject to the right of the defendant and the occupiers, &c., at all reasonable times to enter upon the land thereby conveyed for the purpose of repairing the drain and laying or replacing pipes therein."

The Local Board of Health, under s. 49 of 11 & 12 Vict. c. 63, after the above conveyance, constructed a new sewer (in lieu of the old one, into which the drain discharged the sewerage from the plaintiff's and defendant's premises), at a lower depth; and the defendant thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. Plaintiff having brought an action of trespass:—

Held, that the effect of the deed, executed by both parties, was either to create a tenancy in common in the drain between the plaintiff and defendant, or only an easement in the defendant, but that, in either view, the defendant had done no more than he had the right to do.

CASE stated by order of Kelly, C.B., at the trial, a verdict being taken for the plaintiff, damages 40*s.*, subject to such case.

The action was for an alleged injury to the plaintiff's reversionary interest in certain land, &c., situate at Bedford, by removing a drain, and substituting another drain at a lower level.

The following are the material parts of the case:—

In August, 1864, William Jones was seised in fee of certain land and premises. By an indenture between Jones and the plaintiff, dated the 17th of August, 1864, and executed by both parties, Jones conveyed to the plaintiff in fee a certain part of the land

and premises (hereinafter called the plaintiff's premises), "subject nevertheless to the joint ownership and right to the use, by the said William Jones, his heirs and assigns, and the owners and occupiers for the time being, of the said land and premises now belonging to the said William Jones as aforesaid, and adjoining the premises hereby conveyed (as at present enjoyed by him or them, but no further or otherwise), of the watercourse, drain, or sewer now running through, or laid in, or under, the said piece of land hereby conveyed, from the eastern to the western boundary of the same piece of land, as the same watercourse, drain, or sewer, the joint use whereof is hereby reserved, and the course and direction thereof are marked and delineated in the plan in the margin of these presents, and also subject to the right of the said William Jones, his heirs or assigns, or the owners or occupiers of the said land and premises now belonging to him as aforesaid, at all seasonable times to enter upon the said piece of land hereby conveyed for the purpose of repairing the said watercourse, drain, or sewer, and laying or replacing pipes therein."

William Jones, by his will of the 5th of September, 1868, devised and bequeathed all his real and personal estate to the use of the defendants, their heirs, executors, administrators, and assigns, upon certain trusts.

The Public Health Act (11 & 12 Vict. c. 63) was, at the date of the execution of the above deed, and still is, in force in the borough of Bedford, in which the property in question is situate.

There is and was at the time of the execution of the conveyance a main sewer belonging to the local board in River Street (which is at the east of the plaintiff's premises) into which the drain mentioned in the conveyance discharged the sewage from the plaintiff's and the defendants' premises, but at the date of the conveyance there was no such sewer in Gravel Lane.

In or about the month of December, 1864, the local board, in the due exercise of their powers, altered the system of the drainage of the borough of Bedford, and constructed a new main sewer in River Street to be used instead of the old sewer for sewage and other purposes at a level of 3 ft. 9 in. lower than the level of the old sewer. They also constructed a sewer in Gravel Lane, upon which the defendants' property abuts to the west.

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Shortly after the alteration of the sewer in River Street and Gravel Lane, the plaintiff constructed a new drain at a greater distance from his house, and at a lower level than the old drain, and communicating with the new sewer in River Street, and afterwards and some time in the year 1871, the plaintiff was asked by Smith, the builder employed by the defendants, to allow the defendants to connect the new drain, which the defendants would be obliged to construct to drain their premises, with the new drain made by the plaintiff; this the plaintiff refused to permit.

On the 19th of January, 1872, the surveyor of the local board reported to them, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), that the defendants' cottages, part of the defendants' said premises, were without any drain communicating with a sewer as was sufficient for the proper and effectual drainage of the same and their appurtenances, and that a sewer belonging to the local board was within 100 feet of some part of each of such cottages, viz. of the front thereof, and that a covered drain of the following materials and size, that is to say, of a 6-inch glazed stoneware pipe from the sewer to the said cottages, and at a level of 5 feet deep, and with a fall of 1 in 25 ft. was necessary for the proper and effectual drainage of the same.

The said cottages of the defendants front upon Gravel Lane, and are within 9 ft. 6 in. of the new sewer of the local board in Gravel Lane, but the closets from which the drain runs are about seventy feet from the new sewer in Gravel Lane. The backs of the cottages are within 100 feet of the new sewer of the local board in River Street.

On the 20th of March, 1872, the local board served upon each of the tenants of the defendants' cottages a notice requiring drains to be made in connection with a sewer of the local board.

These notices were duly forwarded to the defendants, who, in order to comply with the same, did the acts complained of in this action, as hereinafter described. When the above notices were sent by the surveyor he did not know of the existence of the drain, and the defendants having explained its situation to him, a plan of the drainage as then intended to be carried out was prepared and approved by the local board, and an order was given by the sur-

veyor to the defendants' builder, Smith, authorizing him to make the necessary connections with the sewers.

The defendants could have drained their houses and premises into the new sewers of the local board in either River Street or Gravel Lane, by means of drains constructed wholly in their own property; but they could not have drained into Gravel Lane without tunnelling under the houses, and they could not have drained into River Street without passing through property belonging to them, but let to a tenant from year to year.

The old drain was composed of unglazed earthenware pipes, of 9 in. diameter. Where the old drain entered the plaintiff's premises it was at a depth of 3 ft. from the surface of the soil, and had a gradual and regular fall of 7½ in. in 20 ft. to the point where it entered River Street, and at the latter point it was at a depth of 3 ft. 6 in. from the surface. The distance between the two points is 80 ft.

In the beginning of April, 1872, the defendants employed Smith to carry out the alterations of the old drain on the plaintiff's premises in accordance with the requirements of the local board, and thereupon Smith, by the defendants' directions, informed the surveyor to the local board of the time when he was about to commence the work, in order that he might be present to see the new drain connected with the sewer.

On the 10th of April Smith employed two men to do the last-mentioned work in the line of the old drain; and when they commenced the work the surveyor to the local board was present, and told Smith that the defendants would not be allowed by the local board to keep the level of the old drain, but must lower the level of the same. Smith and his men thereupon dug down to the old drain on the plaintiff's premises, and commenced removing the pipes thereof and laying new pipes composed of glazed stoneware pipes of 6 in. diameter, at a level of from 2 ft. to 2 ft. 6 in. below the old level. After they had constructed about 7 ft. of the drain so altered, they were seen by the plaintiff and his solicitors, who told Smith that they were trespassing and endangering the plaintiff's house, the drain being only 2 ft. 6 in. from the plaintiff's said house, and Smith then stopped the work.

On the morning of the 11th of April, Smith told the plaintiff

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that he did not intend to continue the work, but in the afternoon of the same day, having in the meantime been instructed by the defendants to complete the drain in accordance with the regulations of the local board, he put on an extra number of men and that day completed the drain. The drain so altered was for a part of its course through the plaintiff's land, at a level of from 2 ft. to 2 ft. 6 in. below the level of the old drain.

All the pipes of which the old drain was composed, and which were in good condition, were taken up, and others substituted by the defendants.

When the old drain was so altered, the land and premises of the plaintiff through which it was made were in the possession of Thomas Rust, as the plaintiff's tenant; and the reversion then belonged to the plaintiff; and the damages, it was agreed, should be 40s., if the plaintiff was entitled to a verdict.

At the time the drain was so altered and deepened the drain as it originally existed was in good repair, and did not require any repairs or any pipes laid or replaced in it, and was in every respect in a fit and proper condition to be used and enjoyed by the defendants or the tenants of their said land and premises as it was used and enjoyed at the date of the said conveyance by the then owners and occupiers of the said land and premises of the defendants; but, in consequence of the alterations in the sewers and the regulations of the local board, it could not be so used.

The Court was to have power to draw inferences of fact.

The questions for the opinion of the Court were:—

1st. Whether the defendants were justified in entering upon the plaintiff's land and premises and digging therein, and opening the old drain and substituting new pipes therein.

2ndly. Whether the defendants were justified in entering upon the said land and premises of the plaintiff and lowering the level of the existing drain for the purposes above mentioned.

Graham, for the plaintiff, contended that, by the lowering of the public sewer, the defendants had lost whatever right of drainage they had through the plaintiff's premises. The drain was only granted as then enjoyed and no further nor otherwise. Lowering the level was making the drain further and otherwise.

Arbuthnot, for the defendants, contended that the clause relied on for the plaintiff only went to confine the drain to the particular houses then built, and, as far as those houses were concerned, the defendants had a full right to keep up the drainage by adapting the drain to the new outfall.

MELLOR, J. I am clearly of opinion that the defendants are entitled to the verdict. The contention of the plaintiff is quite untenable. He is in this dilemma: there is either a joint ownership between him and the defendants, and this would involve of course a right (which however is expressly granted) to do anything necessary to keep the drain in such a state as to be useful as a drain, in which case he can have no cause of action, on the facts, against the defendants. Or else the defendants have an easement with a similar right to enter and do all that is necessary, in which case also no action would lie. I think, even if there were not this joint ownership, and if the defendants only had an easement in the use of this drain, with power to enter, if necessary, to repair it and maintain it in an efficient state to drain the premises, that when the public authority comes and alters the level of the sewer so as to render the drain useless without alteration, in this case also the defendants would be entitled to do what they have done. In either view, therefore, I am of opinion that the defendants are entitled to judgment.

LUSH, J. This seems to me a very clear case. There is a drain used in common by houses on both parts of the property, and a conveyance was made by the owner, whom the defendants represent, to the plaintiff of that part of the property through which the drain runs, with this clause: [The learned judge read the clause.] This conveyance was executed by both parties. This clause, therefore, amounts to a grant by the plaintiff to the defendants of a tenancy in common in the drain. "As at present enjoyed but no further or otherwise," was intended to limit the user, so that the drain should not be used by any other premises. "As the same drain the direction whereof is described on the plan," that is, the defendants are not to alter the course of it, but keep it in the same line. Then at the end is added, "subject also

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to the right of Jones and his heirs, &c., to enter the land at all times for the purpose of repairing the drain and laying or replacing the pipes therein." Clearly the object of this latter clause was that the drain should be kept up as a drain for the use of the parties' respective houses, either party repairing it when necessary, and doing anything needful to keep it up in a state of efficiency. But even without this express right, I am of opinion that it would have been competent for the defendants to enter and make the drain of the requisite depth, and so connect it with the outfall into the sewer as altered and lowered by the public authority.

QUAIN, J. I am of the same opinion. This appears to be a drain from two sets of premises to a public sewer. And by the conveyance the defendants had a right to drainage in a particular direction, as there was a joint ownership between the plaintiff and the defendants in the drain, in the course marked on a plan to the deed. After this conveyance the public authority lowered the level of the sewer, and in order to keep the drain in operation it became absolutely necessary to lower the drain, so as to accommodate it to the level of the sewer. Mr. Graham was obliged to contend that, by this alteration in the sewer, the defendants' right of drainage was gone. But that cannot be so. Suppose the defendants had had no other means of drainage, could it have been contended they had lost it? The defendants clearly had a right to have the drainage from their premises pass in a particular direction; and if by reason of the action of the public authority it becomes necessary that the drain should be lowered, then, either by virtue of the joint ownership in the drain, or by virtue of the clause in the conveyance as to the right to repair and relay the drain, the defendants had a right to keep up, as they have done, a sufficient drain. The clause "as at present enjoyed, but no further nor otherwise," does not apply to the then level of the drain, but to the then existing houses; and the drain was not to be employed to drain fresh-built houses which would impose a greater burthen on the plaintiff. The lowering of the level does not increase the burthen, the drainage is exactly the same, and the only effect is to keep up the drainage as it was

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enjoyed at the time of the conveyance. It is said that the alteration might injure the plaintiff's houses; the defendants would be bound to alter the drain in such a way as not to do any damage. It can be done, and must be so done. But no damage has been done, so that no such question arises. The defendants have done nothing but what they had a right to do, and are entitled to judgment.

Judgment for the defendants.

Attorneys for plaintiff: *Stokes, Saunders, & Stokes.*
Attorneys for defendants: *Sharp & Ullithorne.*

THE QUEEN, ON THE PROSECUTION OF CERTAIN JUSTICES OF LEEDS, RESPONDENTS, *v.* VINE, APPELLANT.

Jan. 27.

Wine and Beer Amendment Act, 1870 (33 & 34 *Vict. c.* 29), *s.* 14—*Licence to sell Spirits by retail*—"*Any person convicted of felony*"—*Retrospective Operation of Statute.*

By 33 & 34 Vict. c. 29, s. 14, "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence shall be granted to any person who shall have been so convicted; and if any person after having been so convicted shall take out or have a licence, the same shall be void to all intents and purposes; and every person who, after having been so convicted, shall sell spirits by retail, shall incur the penalty for doing so without a licence:"—

Held (by Cockburn, C.J., and Mellor and Archibald, JJ.; Lush, J., dissenting), that the section applied to a person convicted of felony either before or after the Act passed; and that licences held by a person convicted before the Act became void on the passing of the Act.

AT the Quarter Sessions for the West Riding of Yorkshire held on the 6th of April, 1874, in an appeal, in which James Vine was appellant and certain justices of the borough of Leeds were respondents, the sessions dismissed the appeal, subject to the following case.

The Fox and Grapes is an old-established inn situate in the borough of Leeds, and in 1873 one James Theaker became by transfer the holder of licences under 9 Geo. 4, c. 61, and subsequent statutes amending the same, by which he was empowered to keep the inn, and to sell exciseable liquors by retail, to be consumed on the premises. The licences to Theaker were duly renewed at the general annual licensing meeting in 1873.

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In January, 1865, Theaker had been convicted of felony, and was then sentenced to and suffered three months imprisonment with hard labour. The fact of such conviction was first known to the authorities of the borough and the owners of the inn in the month of November, 1873.

Thereupon the appellant James Vine became tenant of the inn, and in February, 1874, applied to the justices of the borough for the transfer to him of the licences held up to that time by Theaker. (1)

The justices refused the application on the ground that such licences were void by reason of the conviction of Theaker for felony.

Upon the hearing of the appeal it was contended on the part of the appellant, and denied on the part of the respondents, that the licences held by Theaker were subsisting at the time of the application to the justices by the appellant; and that 33 & 34 Vict. c. 29, s. 14, applied only to persons convicted of felony after the passing of that Act. (2)

The quarter sessions dismissed the appeal upon the ground stated by the justices of the borough.

The question for the opinion of the Court was whether the licences held by Theaker were or were not void by reason of his conviction for felony.

Maule, Q.C. (with him *Wilberforce*), for the respondents. The language of s. 14 of 33 & 34 Vict. c. 29, is clearly retrospective, so far as to apply to a person convicted of felony before the Act. "Every person convicted of felony" can only mean "every person

(1) Vine had left without transferring the licences; and the application really was for a continuation of the licences under s. 14 of 9 Geo. 4, c. 61, by which, when a person "duly licensed" removes from the house, the licensing justices may grant to the new tenant a licence to sell exciseable liquors by retail for the remainder of the current year.

(2) 33 & 34 Vict. c. 29, s. 14: "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid; and if any person shall, after having been so convicted as aforesaid, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes; and every person who, after being so convicted as aforesaid, shall sell any spirits by retail in any manner whatever, shall incur the penalty for doing so without a licence."

who is a convicted felon," that is, "every convicted felon" shall be disqualified.

Poland, and *Tennant*, were then called upon for the appellant. The language of s. 14 is ambiguous, and must therefore be interpreted to be prospective, and to apply only to persons convicted after the Act. The licences of a person within this section are made absolutely null and void, and if it is applied to persons convicted before, a person who had held a licence for twenty years, and expended large sums in improving the premises, would be suddenly deprived of his livelihood. This would be most unjust. Again, he might have been convicted of manslaughter under such circumstances as to have been merely fined in a nominal sum.

[MELLOR, J. There would be the same hardship if the section only applied to convictions after the Act.

COCKBURN, C.J. In 3 & 4 Vict. c. 61, s. 7 (1), the words are, "every person who shall hereafter be convicted."]

That is the Act as to beer licences; and the language is similar in 23 Vict. c. 27, s. 22 (2), as to wine licences; and this affords a strong argument that the present enactment as to spirit licences was not intended to extend further, but only to be prospective. If the contrary had been intended, unambiguous language would and ought to have been used, shewing unequivocally that it was intended to apply to all convicted persons whenever their conviction took place. In Broom's Maxims, at pp. 34–40, where the cases are collected, it is said, "Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be

(1) 3 & 4 Vict. c. 61, s. 7: "Every person who shall hereafter be lawfully convicted of felony, or of selling spirits without licence, shall for ever thereafter be disqualified from selling beer and cider by retail, and no licence to sell beer and cider by retail under the said recited Acts or this Act shall be granted to any person who shall be so convicted as aforesaid; and if any such person shall, after having been so convicted as aforesaid, take out or have any licence to sell beer or cider by retail under the said recited Acts or this Act, the same shall be void to all intents and purposes; and every person who shall, after having been so convicted as aforesaid, sell any beer or cider by retail, in any manner whatsoever, shall incur the penalty of doing so without licence." . . . .

(2) 23 Vict. c. 27, s. 22, is in very similar language as to a licence to sell wine under that Act.

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deemed retrospective in its operation, and opposed to sound principles of jurisprudence. . . . Laws should be construed as prospective, not as retrospective, unless they are expressly made applicable to past transactions, and to such as are still pending. . . . *Moon* v. *Durden* (1) may be cited as a leading decision in reference to the application of the above maxim. The 8 & 9 Vict. c. 109, s. 18, enacts that, all contracts and agreements by way of gaming or wagering shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made. This was held not to defeat an action for a wager commenced before the Act passed. Parke, B., observes that the language, if taken in its ordinary sense, applies to all contracts both past and future, and to all actions both present and future, on any wager whether past or future. But it is, as Coke says, a rule and law of parliament, that regularly nova constitutio futuris formam imponere debet, non præteritis. This rule, which is in effect that enactments in a statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases. . . . Rolfe, B., also remarks that the principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively. . . . In *Marsh* v. *Higgins* (2), Wilde, C.J., says that, Sometimes, no doubt, the legislature finds it expedient to give a retrospective operation to an Act to a considerable extent; but then care is always taken to express that intention in clear and unambiguous language. . . . Those whose duty it is to administer the law, says Erle, C.J., in *Midland Ry. Co.* v. *Pye* (3), very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it

(1) 2 Ex. 22.

(2) 9 C. B. 551, 567; 19 L. J. (C.P.) 297.

(3) 10 C. B. (N.S.) at p. 191; 30 L. J. (C.P.) 314.

should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one's sense of justice than an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction."

Maule, Q.C., was heard in reply, the Court not being agreed.

COCKBURN, C.J. I am of opinion that the rule should be discharged. I feel bound by the language used in s. 14 of 33 & 34 Vict. c. 29, which enacts, that "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and that no licence to sell spirits by retail shall be granted to any person who shall have been so convicted; and if any person shall, after having been so convicted, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes." The question is, whether a person who had been convicted of felony before the Act was passed became disqualified on the passing of the Act. I think he did. If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character. It may be that the felony may in some instances be such as not to affect the character in the ordinary sense of the term, as when by negligence so as to involve no criminality of purpose, a person may have caused the death of another and have been convicted of manslaughter and suffered only a trifling punishment. But the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be

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kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence. On looking at the Act, the words used seem to import the intention to protect the public against persons convicted in the past as well as in future; the words are in effect equivalent to "every convicted felon." Suppose a man, convicted prior to the Act, applied for a licence, would the magistrates be justified in giving him a licence on the ground that, having been convicted before the Act passed, he was not disqualified? Surely not; the only question for the magistrates would be whether he had or had not been convicted of felony. We have in the preceding Acts language quite different from the present, for it clearly pointed to the future only, and operated only upon future convictions; and with these statutes before them the legislature has altered the language in this very striking manner, clearly with the intention of including all of the convicted class in one category. No doubt what Mr. Poland said as to the hardship, if a licence is to become ipso facto on the passing of the Act null and void, is just, because it is interfering to a certain extent with vested interests; but the legislature might have made exceptions to meet these cases, but they have chosen rather, as I have said, a hard and fast line to meet all cases. I am therefore of opinion that Theaker became on the passing of the Act disqualified, and the licences null and void, and could not inure to the benefit of the proposed transferee, the subsequent tenant.

MELLOR, J. I am of the same opinion. I do not dispute the general proposition put forward by Mr. Poland, nor the propriety of the dicta of the learned judges which he has cited. It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character. And accordingly by this clause, instead of leaving open the inquiry as to character, it is enacted, that if a man has been convicted of felony, it shall not be necessary for the justices further to inquire into his character; but they shall not grant him a licence. Convicted felons are to be an absolutely dis-

qualified class, for the good reason that a man convicted of felony is tainted in character. A man convicted before the Act passed is quite as much tainted as a man convicted after; and it appears to me not only the possible but the natural interpretation of the section that any one convicted of felony shall be ipso facto disqualified, and the licences, if granted, void.

LUSH, J. I am sorry that I cannot concur in the judgment of the rest of the Court. I, of course, express my view with great diffidence, but I cannot bring my mind to their opinion. I fail to connect with s. 14 any indication of an intention to make its operation retrospective. The effect of the section, on the construction put by the rest of the Court, is, undoubtedly, that every person holding a licence, who had previously been convicted of felony, would at once, on the passing of the Act, forfeit his licence, and be deprived of all interest, and would be liable from the moment the Act passed to penalties. This is, therefore, a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used. Now I cannot collect any indication of an intention to make the enactment retrospective from the language used in s. 14. The words, "every person convicted of felony shall be disqualified," may mean either every person "who shall be convicted," or every person "who shall have been convicted." The expression is ambiguous, taking it alone. Nor does the subsequent part of the section throw any light upon it; it is equally applicable to a person convicted after the Act as to a person convicted before. This is, therefore, the very case in which the above canon of construction applies, that no enactment should be interpreted prospectively, being a disabling and disqualifying enactment as to the position of the person convicted. If s. 14 stood alone, I should thus interpret it. But two other statutes have been referred to in pari materie, and they seem to me rather to confirm this view. By 3 & 4 Vict. c. 61, s. 7, it is enacted that every person who shall hereafter be convicted of felony shall for ever thereafter be disqualified from selling beer by retail, and no licence shall be granted to any person who shall be so convicted.

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This was as to selling beer; then, by 23 Vict. c. 27, s. 22, a similar enactment was passed as to wine licences. And s. 14 of the present Act would naturally extend the disqualification as to selling spirits only to the same class; and, reading its ambiguous language by the light thrown upon it by the other statutes, I should read it as not ipso facto disabling a person convicted before the Act. The argument was made that the omission of the words "who shall be hereafter" shewed that the intention of the framer of the Act was to make the section retrospective. What the intention may have been is mere matter of speculation; he may have intended to draw the section in a very condensed form, and struck out all the words that were considered superfluous. If it had been the intention to contrast this section with the former two, and to make it retrospective, the others being prospective only, I should have expected to find words clearly indicating such an intention. The words used are ambiguous, and what was the intention is therefore left to mere speculation; and, without any clear indication that it is intended to extend beyond the future, I think we ought to interpret the section as relating to the future alone, and not as retrospective in its operation.

ARCHIBALD, J. I agree with the Lord Chief Justice and my Brother Mellor. I was at one time impressed with the argument of Mr. Poland, that the enactment was in its nature penal; and I quite agree, if it were simply a penal enactment, that we ought not to give it a retrospective operation; but it is an enactment with regard to public and social order, and the infliction of penalties is merely collateral. There seems to me, so looking at the Act, to be no difference between the expression "every convicted felon" and the expression used in the first part of s. 14, "every person convicted of felony," and this must lead to the conclusion that this enactment was intended to be retrospective; and if the first part is meant to apply to any person whenever he may have been convicted, the same construction must apply to the latter part, and it must affect a licence in force when the Act came into operation. I draw from the former Acts quite a different conclusion from my Brother Lush. The language of the former Acts was clearly prospective, and only applied to the future,

and when the language of the new Act is altered, omitting the words which clearly confined the former enactments to the future, the only conclusion, as it seems to me, to be drawn is, that this was done with the object of making the enactment retrospective, and not prospective only.

Judgment for the respondents.

Attorneys for respondents: *Simpson & Co.*

Attorneys for appellant: *Massey, Taylor, & Hales, for J. G. Turner, Leeds.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 2.

THE PLUMSTEAD BOARD OF WORKS *v.* THE BRITISH LAND COMPANY.

Metropolis Management Acts, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250; *and* 1862 (25 & 26 *Vict. c.* 102), *s.* 77—"*Owners of Land*"—*Public Roads not Land bounding or abutting on Streets.*

1 QBD. 69, 70
R. & D. 341
844 Ca
668, 693-5
702

The defendants, a land company, being owners of certain lands, in 1863 laid them out for building purposes, and made roads and ways across them; and nearly the whole of the estate was sold in lots to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on coloured plans attached to the conveyance. Each lot had a frontage upon one of the roads. The roads had been dedicated to the public, as far as any act of the defendants could do so, but no proceedings were taken to make them repairable by the parish. The plaintiffs, the board of works of the district, from time to time paved the new streets formed by the houses on the estate, and apportioned the costs among the owners of houses forming the streets and the owners of land bounding and abutting on the street; and in so doing they assessed the defendants in respect of the new streets and roads where bounding or abutting on the sides or ends of the streets paved, as "lands abutting" on those streets, under s. 77 of 25 & 26 Vict. c. 102:—

Held, reversing the judgment of the Queen's Bench, that, assuming the soil of the roads to be in the defendants, they were improperly charged under 25 & 26 Vict. c. 102, s. 77, for that they were not, in respect of the roads which had been irrevocably dedicated to the public, "owners of land" within the meaning of that section and s. 250 of 18 & 19 Vict. c. 120.

ERROR from the judgment of the Court of Queen's Bench, in favour of the plaintiffs on a special case: ante, p. 16.

Fitzjames Stephen, Q.C. (with him *G. Shaw* and *R. V. Williams*), for the defendants. [He contended, first, that the soil of the roads,

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usque ad medium filum passed by the several conveyances to the purchasers of each lot, according to the cases cited in the Court below.] Secondly, assuming the defendants to remain the owners of the soil of the roads, they were not "owners of land" within the meaning of the statutes. The roads are not land that can be let at a rack-rent within s. 250 of the first Act; nor are they land which can be said to bound or abut on the streets within s. 77 of the second Act. *Lord Northbrook* v. *Plumstead Board of Works* (1), which was the case relied on in the Court below, is clearly distinguishable. The roads there were private; whereas here the roads are irrevocably dedicated to the public. In *Bowditch* v. *Wakefield Local Board* (2), again, there was no reason that the school-house should not be let at a profit if the owners chose. In *Angell* v. *Paddington* (3), on the contrary, a church with strips of land adjoining was held to be neither house nor land within the sections; because there never could be any beneficial occupation, and so no one could be entitled to the rack-rent. If the plaintiffs are right in their construction, the defendants might be made liable four times over in respect of their ownership of the land at the intersection of four streets, that is, to the paving of each of the four streets. Houses alone forming a street were liable under s. 105 of the original Act; and then, by s. 77 of the second Act, land was made also liable; but it must be land situate in the same way as houses, that is, bounding or abutting on the streets, and not part of the streets themselves; in other words, land having a frontage to the streets. The provision in s. 77 as to the paving of the intersection of the streets shews that the intersections themselves were not supposed to be land within the meaning of the Acts.

Barrow, (with him *J. Brown, Q.C.*, and *Morgan Howard, Q.C.*), for the plaintiffs, was directed by the Court to confine his argument to the second point. The case is not distinguishable from *Lord Northbrook* v. *Plumstead Board of Works*. (1) The roads there were irrevocably dedicated to the use of the tenants. The soil of the road is just as much land as a vacant space abutting on a street. The statute says nothing about frontage; all that is

(1) Law Rep. 7 Q. B. 183. (2) Law Rep. 6 Q. B. 567.
(3) Law Rep. 3 Q. B. 714.

necessary is that it should be house or land in a street. The difficulties suggested would not arise in practice, and credit must be given to the board that it will not proceed in an arbitrary or oppressive manner. The provision in s. 77 as to the expense of the paving of the intersections of streets was inserted to enable the extra expense of that part of the paving to be thrown upon the whole street.

Stephen, Q.C., was not called upon to reply.

LORD COLERIDGE, C.J. I am of opinion that this judgment should be reversed. This is an attempt by proceedings at law on the part of the Plumstead Board of Works to recover from the defendants a proportional part of the expenses of paving certain intersecting streets. The facts are:—The defendants bought a large estate, and they laid it out in building lots, and through the estate they ran a variety of roads, and at various points in these roads, which were afterwards to become streets when built upon, there were intersections; and the Board of Works, under the powers of certain sections of two Acts of Parliament, paved these streets, the expense of which, subject to the enactments of these Acts of Parliament, they have a right to recover from the owners of certain property, houses and lands, described in these statutes. The expense of paving these various streets, where there is either land or houses directly abutting on the streets, has been allocated according to the Acts of Parliament among the owners of the houses and owners of the land abutting on the streets. Objection is taken by the defendants to the action of the board in respect of the charge made upon the defendants for their proportion of the pavement of these intersecting streets; and it is said by the board that under the Acts the land company are liable to such proportion of the expense.

The company have, to a considerable extent, conveyed away their property to different persons for building purposes; and two points have been made. It was said, first, that the defendants, by their conveyances, had not taken out of themselves the soil of the streets; and that, therefore, they had not taken out of themselves the soil of the intersections of the streets, and that

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they were liable for the expenses of the paving with respect to those intersections.

Upon the first point I give no opinion. It has only been argued on one side. For the purpose of the second point I assume that the judgment of the Court below is correct, and that the property in the streets did not pass by the various conveyances which the defendants made to individual purchasers. And the question is, whether under these circumstances the defendants can be charged by the local board with a portion of the expense of repairing and paving in respect of their ownership of land at these intersections. Whether they can or not must depend upon ss. 105 and 250 of 18 & 19 Vict. c. 120, and on s. 77 of 25 & 26 Vict. c. 102. The first Act only enabled the board, by s. 105, to charge the paving of streets upon the owners of houses forming such streets. It was admitted that that section alone would not be sufficient to render the defendants liable. But it would be well to consider that section and s. 250 with reference to the definition of owner. By s. 250, which is the interpretation clause, "owner" is defined to "mean,"—not to include, but to "mean,"—"the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." By s. 110 of 25 & 26 Vict. c. 102, the two Acts are to be construed as one Act. So that the interpretation clause is to be read as if it were a section in the later Act. And then by s. 77 of that Act, where the district board shall, under the powers given by s. 105 of the previous Act, have paved or be about to pave any new street, "the owners of the land,"—that is, the persons receiving the rack-rent of the land or the person who would receive it if the premises were let at a rack-rent,—"the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as owners of houses therein: Provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection

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of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board," and shall be recoverable in certain ways pointed out by the statute.

Now, it appears to me that the land company are not, within either the interpretation clause of the earlier Act or within the fair meaning of s. 77 of the later Act, "owners of land," so as to be charged with these repairs. Houses are out of the question; but it is important to see who were the "owners" chargeable in the first Act, in order to ascertain who were the sort of persons intended to be charged in the amending Act. Now, the persons chargeable with the pavement in the first Act were the people, so to speak, who lived in the street when there are people living in the street, at all events, the owners of the houses being in the street. But there might be a street made and laid down at considerable expense, with houses either not built or houses uninhabited, or with vacant spaces between house and house, and where the owner of that intervening property derived all the same benefits, or nearly all the same benefits, from the expense incurred by the board, that the owner of houses did, and yet by a slip in the Act he was not bound to contribute. The subsequent Act sets that right, and says that not only the houses, but (and I purposely use popular language) the land shall contribute, and the land not being so valuable, and possibly not receiving the same advantages, shall, if the vestry or board think fit, contribute in a less proportion than the house property in the street; but the sections of the two Acts looked at together point clearly, in my mind, to the same class of property, namely, house property in the street and land property (to use that expression for the purpose of clearness) in the street. I think, therefore, that this was not such property, and that the land company were not owners of such property; they were not owners of land within the meaning of these statutes. I think, further, if the words of s. 77 be looked at closely, it will be seen that it cannot have been intended that they should be included. I am not prepared to say, that, by some very strict technical mathematical definition, it may not be possible to hold that the parallelogram at the intersection of the streets "bounds" the four streets which run into it; but, certainly, I should say upon those words, if they stood alone, that no

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man, construing them secundum subjectam materiem, and by common sense, could reasonably come to the conclusion that a rectangular figure, which must after all be bounded by imaginary lines, was land bounding or abutting on the four streets. But when one goes further into s. 77, and when one sees that the owners of houses and the owners of land (which, for the reasons I have already given, seem to me to be the owners of houses and land in the street) are to be liable not only for the repairs of the street proper, but are to be liable for the paving and repairs of the intersections of the streets, I confess, with the greatest possible respect for the Court below, it seems to me that words cannot be plainer, and that they can only bear the interpretation we are now giving, namely, that the expenses must be apportioned rateably among all those neighbouring proprietors of land and houses forming the different streets which adjoin the intersection in such proportion as the vestry or board think just.

That, therefore, seems to be, on the strictest interpretation of the words of the two Acts of Parliament, the proper interpretation to be given to them. The cases do not seem to me to embarrass us; the only case about which there is any difficulty is the case of *Lord Northbrook* v. *Plumstead Board of Works.* (1) The circumstances in that case were very different; but no doubt expressions fell from the Court which, though they must be regarded, as in all such cases, with reference to the subject-matter to be decided, are capable of being pressed in support of other points. In that case, Lord Northbrook had for his own purposes determinately reserved the property in the private roads in himself. He might at any moment have put an end to the dedication of them to his own tenants, which was all that he had ever done. There was no dedication of it to the public, and there was nothing done past recall; and the Court of Queen's Bench held that, in that particular case, where the thing had been done on purpose, and where the property had been determinately and deliberately retained in Lord Northbrook, Lord Northbrook must be considered to be the owner of land within the meaning of the Act, and on that ground (from which I am not prepared to differ), held that he was rateable, and must contribute to the expense. But the same

(1) Law Rep. 7 Q. B. 183.

Court held, in a short but clear and determinate judgment in *Angell* v. *Paddington* (1), that the trustees of a church, around which there was a piece of land, were not owners of either land or houses within the meaning of the statutes. Owners of land, for real property purposes, unquestionably they were; owners, too, of a house for certain purposes they were; but the Court of Queen's Bench looked, as we are doing, at the common sense of the thing, and they said it was plain that the trustees of a church were not the owners of land which could be let at a rack-rent within the meaning of the statute; and although they might come within the definition of holders of land and houses, that they were not within the meaning of holders of land or houses for the purposes of the sections in question.

I therefore think, upon the strict construction of the Acts, and upon the sense of the thing, and upon the decided cases, that the Court below was wrong. I come to that conclusion with less difficulty because I do not perceive that either in the arguments or in the judgment of the Court, certainly not in the judgment of the Court, some of the most important considerations upon which we are basing our judgment were prominently brought forward. The judgment must therefore be reversed.

BRAMWELL, CLEASBY, POLLOCK, and AMPHLETT, BB., and GROVE, J., concurred.

Judgment reversed.

Attorneys for defendants: *R. & A. Russell.*

Attorneys for plaintiffs: *Newman, Dale, Shelton, & Hilliard.*

(1) Law Rep. 3 Q. B. 714.

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Feb. 3.

[IN THE EXCHEQUER CHAMBER.]

THREFALL *v.* BORWICK.

Innkeeper, Lien of—Piano.

A. went to the defendant's inn and stayed there with his family for some time; he took with him to the inn a piano as his own which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as innkeeper:—

Held, affirming the decision of the Court of Queen's Bench, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so he had a lien upon it.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter the verdict for the plaintiff: Law Rep. 7 Q. B. 711, where the pleadings are fully stated.

The declaration was for detaining a pianoforte of the plaintiff.

Plea, inter alia, the defendant's lien as an innkeeper.

It appeared at the trial before Lush, J., at the Lancaster Spring Assizes, 1872, that the defendant kept an hotel on Lake Windermere, and one Butcher came there, with his wife and sister, in April, 1871. In addition to board and lodging, Butcher had a private sitting-room. He brought with him a pianoforte, which the defendant thought was Butcher's own, but which he had hired of the plaintiff. This was put in the sitting-room. After several weeks Butcher left the hotel 45*l.* in the defendant's debt for board, &c.; and on demand by the plaintiff, the defendant claimed to detain the piano, in exercise of his lien as innkeeper, for the debt due from Butcher.

A verdict passed for the defendant, with leave to move to enter it for the plaintiff for twenty-two guineas, and a rule was obtained accordingly, on the ground that the plaintiff had no lien upon the piano. The Court of Queen's Bench discharged the rule. (1)

J. Edwards, Q.C., for the plaintiff. It must be admitted that an innkeeper has a lien on goods brought by the guest as his own, although they do not really belong to him. But the lien is only upon such goods as he would be bound to take in. In *Broad-*

(1) Law Rep. 7 Q. B. 711.

wood v. *Granara* (1), in which the defendant claimed a lien upon a piano which had been sent by the plaintiffs to the defendant's inn for the use of a guest, Parke, B., in the course of the argument, says: "An innkeeper has a lien on such goods only as he is compelled to receive with his guest. Could he be indicted for not receiving a pianoforte? It might be a nuisance to persons in his house." And, again, in his judgment, the same learned judge says: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends upon his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this pianoforte."

[LORD COLERIDGE, C.J. The 5th resolution in Calye's case (2) extends the innkeeper's liability for loss beyond that. Is there any authority, except the dicta of Parke, B., which were unnecessary for the decision of the case in hand, that the lien is only commensurate with the obligation to receive?]

No other authority can be found. In *Yorke* v. *Greenaugh* (3) the right seems to have been based on the obligation to receive.

[BRAMWELL, B. If the piano had been stolen would the defendant have been liable?]

It must be conceded that he would.

[BRAMWELL, B. Is not that conclusive in favour of the lien?]

W. G. Harrison, for the defendant, was not called upon.

LORD COLERIDGE, C.J. The plaintiff's counsel has said all that could be urged in support of his case, which is really hopeless. It is admitted that in general an innkeeper has a lien on all goods which the guest brings with him as his own, whether they are his own or another's; and the only question raised is, whether the lien extends to goods which the innkeeper would not have

(1) 10 Ex. 417, 420, 423; 24 L. J. (Ex.) 1.

(2) 8 Co. Rep. at fol. 33 a.

(3) 2 Ld. Raym. 866.

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been bound to receive. I may say that I should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usages of society, the innkeeper might be well held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question, because we are all clearly of opinion that, the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it. Both on principle and authority the judgment must be affirmed.

BRAMWELL, CLEASBY, POLLOCK, and AMPHLETT, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Williamson, Hill, & Co., for Woodburne & Poole, Ulverston.*

Attorneys for defendant: *John Scott, for Fisher, Windermere.*

Feb. 3.

GALLIN *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Carrier of Passengers—Passenger travelling free at his own Risk—Negligence.

10 QB 288

The plaintiff travelled by the defendants' railway from L. to G. as a drover with cattle, without payment, on the condition, which he knew, that he travelled at his own risk. On the train arriving at G. it stopped on a bridge over a river; the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff got out of the train, and in walking along the railway from the spot where the train stopped to go off the defendants' premises, fell over the parapet of the bridge and was injured:—

Held, that the terms under which the plaintiff travelled exempted the defendants from liability, not only during the actual transit on the railway, but whilst the plaintiff was going from the defendants' premises.

FIRST COUNT, that the defendants were carriers of passengers on a railway from Preston to Garstang, and used a station at Garstang for the reception and accommodation of their passengers, which station was in the possession and under the management of the defendants; that the plaintiff was a passenger of the defendants to be carried from Preston to Garstang for reward to the defendants. Breach: that the defendants negligently conducted them-

selves in and about carrying the plaintiff on the journey and in the management of the train whilst the plaintiff was a passenger, so that the plaintiff was thrown down whilst alighting from the train at Garstang and was injured.

Second count, similar to the first, but alleging as a breach that the defendants negligently managed the station and carriages, and placed the carriages at inconvenient and dangerous places in the station, and kept the station in a dangerous state, and omitted to light the station in a proper manner for the use and accommodation of their passengers safely to depart from the carriages on their arrival at the station, whereby the plaintiff, on alighting from the carriages at the station at Garstang, was thrown down and injured.

Third count, that the defendants were possessed of a railway from Preston to Garstang, and were carriers of passengers for hire; that the plaintiff had become a passenger of the defendants to be by them, as such carriers, carried from Preston to Garstang for reward to the defendants, and had been so carried from Preston to Garstang; and at Garstang, at the request and invitation of the defendants, the plaintiff alighted from the carriage in which he had been such passenger; and the railway was, as the defendants well knew, unlighted, unfenced, unguarded, and in a dangerous condition, and was unfit for the reception of passengers alighting from carriages, whereby the plaintiff, in lawfully walking along the railway for the purpose of leaving it at the place directed by the defendants, fell over a wall, and was injured.

Pleas. 1. Not guilty. 2. That plaintiff was not a passenger. 3. As to third count, that defendants did not know that the railway was unlighted, unfenced, unguarded, and in a dangerous condition, as alleged.

Issue joined.

At the trial before Amphlett, B., at the Liverpool Spring Assizes, 1874, the following facts were proved. The plaintiff was a cattle dealer, and forwarded two trucks containing cattle from Liverpool to Garstang. The train, with the cattle trucks attached, travelled as far as Lostock Hall on the Lancashire and Yorkshire Railway, and from thence to Garstang by the defendants' railway. The plaintiff having obtained from the officials of the defendants' railway two cattle labels, the cattle trucks were, at Lostock Hall,

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detached from the train and attached to a train belonging to the defendants' railway; the plaintiff travelled as a drover with the cattle from Lostock Hall to Garstang, paying nothing, the condition, which he knew, being that he travelled at his own risk. The train, on arriving at Garstang, stopped for the purpose of shunting the cattle trucks to the cattle station, and the plaintiff, at the request of the guard, got out of the van in which he was travelling as a drover. The train had stopped near a bridge over the river Calder, and the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff, in walking from the spot where the train stopped along the railway to the passenger station, fell over the bridge into the river and was injured.

It was contended, on behalf of the defendants, that assuming they were guilty of negligence, they were not liable, as the plaintiff was travelling at his own risk.

The jury found a verdict for the plaintiff for 325*l.* damages, leave being reserved to the defendants to move. The Court to make any amendment in the pleadings that might be necessary.

A rule was afterwards obtained to enter a nonsuit or a verdict for the defendants, on the ground that the plaintiff was travelling at his own risk, and that there was no negligence on the part of the defendants or their servants.

C. Russell, Q.C., and *French*, shewed cause. The question is, assuming that the plaintiff is travelling "at his own risk," is there any negligence by the company or breach of duty by the company which gives the plaintiff a right of action? In the case of carriage of goods, the Courts have held that where there is a condition that the carrier is not to be liable for any risk of carriage, such a condition covers every injury that happens to the goods during their transit, but that the carrier is not exempt from liability where there has been an unreasonable delay in forwarding the goods to their destination: *Robinson* v. *Great Western Ry. Co.* (1); *D'Arc* v. *London and North Western Ry. Co.* (2) From this it may be fairly argued that a general condition to travel "at his own risk" does not cover all risks incident to the act of carrying; for instance, if a passenger travelling at his own risk has been delayed for an unreasonable

(1) 35 L. J. (C.P.) 123. (2) Law Rep. 9 C. P. 325.

time at an intermediate station in consequence of the company's negligence, they would not be exempt from liability. There are therefore certain risks for which the company would be liable. Here the journey was at an end when the train stopped, and the plaintiff got out. The contract under which the plaintiff was carried was that he was to be at his own risk during the journey. When the journey ended, the plaintiff was on the premises lawfully with the defendants' licence; he had then the same rights as against the company as any person lawfully upon the premises would have. The plaintiff having been injured whilst lawfully on the premises, he was entitled to bring his action. *Hodgman* v. *West Midland Ry. Co.* (1), which will be relied on by the defendants, is not in point; it was a decision founded on the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 2), and turned on the interpretation of the words "receiving, forwarding, and carrying."

Aspinall, Q.C., and *A. G. Shiell*, in support of the rule, were not heard.

BLACKBURN, J. I think there can be no doubt the rule must be made absolute to enter a nonsuit. It must be taken to be the fact that the plaintiff was travelling on the defendant's railway gratis, and on the terms that it should be at his own risk, and the question reserved was, whether the fact that the plaintiff was travelling at his own risk exempted the company from liability for that which would have been negligence as against an ordinary passenger. The principle on which the company would be liable in such a case is stated in *Parnaby* v. *Lancaster Canal Co.* (2), and has since been acted on in numerous cases. A person, who invites another to come on his premises, undertakes with regard to that person a duty to take reasonable care that the premises on which he invites the person to come, the approach to the premises, as well as the exit, shall be in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger. That is the implied engagement of the company to any passenger who comes on the premises. Whether there would be any such implied engagement towards a person who

(1) 5 B. & S. 173; 33 L. J. (Q.B.) 233; in error, 6 B. & S. 560; 35 L. J. (Q.B.) 85

(2) 11 A. & E. 223.

(1 Sc. & Jur. N.S. 673.

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was invited to come on premises without any payment of money or towards a volunteer we need not inquire. There is such an implied engagement to a passenger, because such implied engagement and duty is part of their contract with the passenger. But here the stipulation of the company is "We will take you free, provided you travel at your own risk." That certainly seems to me to amount to this: "We claim that we shall be free from liability for the negligence of our servants, and also that we shall be free from the consequences of those incidental risks, both before and after the actual transitus, arising from the state of the premises." I think the decision of the majority of the Court in *Hodgman* v. *West Midland Ry. Co.* (1) goes to this extent, because it was there held that the limitation of the value to 50*l.* under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, s. 2) extended to an accident happening to a horse while yet in the hands of the plaintiff's servant, in leading it into the yard of the defendant company. Their liability was limited, notwithstanding that the mischief happened to the horse in consequence of the yard not being kept reasonably safe for persons coming with horses into the yard, with the intention of having them carried by the railway. *Carr* v. *Lancashire and Yorkshire Ry. Co.* (2), the case which led to the passing of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), is also a strong authority in favour of the defendants. In that case the horse was killed by the gross and culpable negligence of the driver of another train, a servant of the company, and if the horse had been the property of a stranger, or even if it had been trespassing on the railway and could not get out of the way of the coming train, the company would have been liable; yet the Court of Exchequer held that, as there was a stipulation in the contract of carriage that the horse should be carried at the risk of the person sending it, they must give judgment for the defendants, leaving it to the legislature, if they thought fit, to alter the law; an appeal which the legislature very soon answered by passing the Railway and Canal Traffic Act. I think the rule to enter a nonsuit must be made absolute.

(1) 5 B. & S. 173 · 33 L. J. (Q.B.) 233; in error, 6 B. & S. 560; 35 L. J. (Q.B.) 85.
(2) 7 Ex. 707; 21 L. J. (Ex.) 261.

C.P.C. 10 Jur. N.S. 675.

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MELLOR, J. I am of opinion that the words "travel at his own risk" include, as in *Hodgman* v. *West Midland Ry. Co.* (1), all the incidents connected with the journey. I think all those risks which result or arise during the transit, and until the transit is actually at an end, are intended to be guarded against and are actually guarded against by those words.

LUSH, J. The only point is, what is the extent and meaning of the stipulation to which the parties have come? I entirely agree that that stipulation covers not only the transit on the line of railway, but also the access to and departure from the railway, all that takes place while the person is a passenger.

Rule absolute. (2)

Attorneys for plaintiff: *Vizard & Co., for J. J. Yates, Liverpool.*
Attorney for defendants: *R. F. Roberts.*

GREENFIELD *v.* REAY.

Jan. 18.

Libel—Criminating Interrogatories, as to the Authorship and Publication.

In an action for libel, on an affidavit that the libel was in a printed handbill to which there was no printer's name, that the plaintiff could not ascertain who was the printer, and that the defendant had been seen with a person who affixed some of the handbills, and was also seen posting one himself, the Court allowed interrogatories to be administered to the defendant as to whether he had not been instrumental in printing and publishing the libel.

DECLARATION for printing and publishing of the plaintiff, in the way of his trade as a butcher, a libel in the shape of a placard, notice, or handbill, alleging that the plaintiff had been recently brought up before the magistrates at the Sunderland borough police court for being in possession of short weights, and that he had previously made his appearance at the police court on other charges.

The matter having been before Lush, J., at Chambers, who referred it to the Court,

Crompton moved for a rule ordering interrogatories to be

(1) 5 B. & S. 173; 33 L. J. (Q.B.) 233; in error, 6 B. & S. 569; 35 L. J. (Q.B.) 85.

(2) See *McCawley* v. *Furness Ry. Co.*, Law Rep. 8 Q. B. 57.

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GREENFIELD v. REAY.

exhibited to the defendant as to whether the defendant had not been instrumental in the printing and circulating and posting of the above handbill. He moved on an affidavit by the plaintiff, stating that he was a butcher in Sunderland, and was the person intended by the handbill; that the handbill had no printer's name attached, and the plaintiff could not ascertain who was the printer of it; that the plaintiff had reason to believe that the handbills were printed and circulated under the direction of the defendant. That the defendant was seen with a man who actually affixed and delivered the handbills; that the plaintiff himself saw the defendant affix one of the handbills on the shutters of a shop in Sunderland, and the plaintiff, in the defendant's presence, tore it down.

Hugh Shield shewed cause in the first instance, and contended that as the answers to the proposed interrogatories might criminate the defendant, they ought not to be put. He cited *Stern* v. *Sevastopulo* (1), and *Edmunds* v. *Greenwood* (2), and contended that there was nothing in the circumstances stated in the affidavit to bring the case within the exception from the general rule, as enunciated in the judgment of the Court of Common Pleas in the latter case.

COCKBURN, J. We are quite agreed that there are special circumstances here which take the case out of the general rule, and entitle the plaintiff to administer the proposed interrogatories. For myself, I am not inclined to extend the protection which has been given to defendants in actions of libel.

BLACKBURN, MELLOR, and LUSH, JJ., concurred.

Rule absolute.

Attorney for plaintiff: *G. J. Brownlow.*

Attorney for defendant: *John Scott, for William Bell, Sunderland.*

(2) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268. (2) Law Rep. 4 C. P. 70.

10 Jur. N.S. 317

END OF HILARY TERM, 1875.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXVIII VICTORIA.

WHITE *v.* THE HINDLEY LOCAL BOARD OF HEALTH.

1875
April 27.

Local Board of Health, Liability of, for Defect in Grating over a Sewer—11 & 12 *Vict. c.* 63, *ss.* 43, 45.

As the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. Plaintiff brought an action against the local board of health of the district, who are the surveyors of the highway, by ss. 68, 117, of 11 & 12 Vict. c. 63, and in whom also the sewers are vested under ss. 43, 45 :—

Held, that, though the defendants might not be liable as surveyors of the highway, they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state.

4 Eff Cas 267
11 C.L.848
9 QBD 451
45 L.J.
15 QBD 118

APPEAL from the county court of Lancashire, holden at Wigan.

This was an action against the defendants, a local board of health established under the Public Health Act, 1848 (11 & 12 Vict. c. 63) for the district of Hindley, for injury sustained by the plaintiff's horse, by reason of its putting one of its feet upon a grid which was out of repair on the highway in Hindley leading from Wigan to Leigh, and within the district and within the lighted area of the Hindley local board, in the month of April, 1874.

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WHITE v. HINDLEY LOCAL BOARD.

The plaintiff's notice of action was admitted by the defendants to have been duly given and to be sufficient, and the amount of damage sustained by the plaintiff was also admitted.

The cause of action stated in the notice was, "For that you, the local board of health, your servants, workmen, and others, on or about the 10th April last, and for some time previously, did wilfully, wrongfully, and negligently permit and suffer a certain grid or grating placed in or upon the surface of a certain public turnpike road or highway in Hindley leading from Wigan to Leigh, and above a certain sewer running under the said road, to remain in a broken, dangerous, and unsafe state and condition, which said grid or grating and sewer were and are under your control and management, and that you did so wilfully, negligently, and improperly, and in violation of your duty in that behalf, conduct yourselves in the keeping and control of the said grid or grating, and in permitting the same to remain unrepaired as aforesaid without taking due and reasonable care and precaution to guard against danger or damage to horses, carts, and persons lawfully passing along and over the said road, that by reason thereof, and of the premises, a horse belonging to me which was on the said 10th day of April last being lawfully ridden and passing along the said road, was injured."

The following facts were proved:—The highway leading from Wigan to Leigh is, to the extent of 13 ft. in width, paved with stone sets, and the other part of 10 ft. 4 in. is soft, being composed of cinders, used both by persons travelling on horseback and pedestrians. At the edge of the part of the road which is paved, and within the cinder or soft part of the road, are iron grids, or gratings, about sixteen inches square on the outside and twelve inches square on the inside. The grids were placed at equal distances of about 100 yards along the road, for the purpose of conveying the surface-water off the paved portion of the road into a sewer running under the grids.

The grids were so placed in the road before the local board was established, and upon its formation the sewer and the grids became vested in, and belonged to, and were entirely under the management and control of, the board of health.

On the 10th of April, 1874, the plaintiff's son was riding the

plaintiff's horse along the highway in question, in the daylight, and in attempting to pass a cart which was going in the same direction as himself, he rode his horse off the paved part of the road on to the cinder or soft part, and in doing so the horse put its foot upon the grid in question, two bars of which had been previously broken, and a third bar gave way; and the horse's hind foot went through the grid, and it remained fixed to and was pulled out of its bed by the horse's leg, the horse being thereby damaged and injured.

It was proved that the grid had had two bars broken for six months prior to the accident, but it did not appear that any notice of its defective state had been given to the local board; and the clerk of the local board, the only witness called by the defendants, said that he was not aware of it, and he was the proper party to be served with all notices intended for the local board. He also stated that it was the duty of the foreman of the Hindley local board to look after the roads at the time of the accident, and that he should consider such foreman guilty of neglect if he had allowed a grid to remain broken for six months without communicating the fact to the local board. The same witness added that he saw no objection to the plaintiff's son riding where he was when the accident occurred.

It was contended for the plaintiff that one or more of the servants of the defendants had been guilty of such negligence as to make the defendants reponsible in damages to the plaintiff, and the case of *Foreman* v. *Mayor of Canterbury* (1), with the cases therein cited, was relied upon.

It was contended for the defendants that the act complained of amounted to a nonfeasance only, for which the plaintiff had no remedy by action, but only by an indictment, and *Gibson* v. *Mayor of Preston* (2) was relied upon.

The judge gave a verdict for the plaintiff; but, on the application of the defendants, gave leave to appeal; and the question for the opinion of the Court was whether, under the above facts, the defendants are or are not liable in an action for the injuries caused to the plaintiff's horse.

(1) Law Rep. 6 Q. B. 214. (2) Law Rep. 5 Q. B. 218.

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Baylis, for the defendants. The cause of action is nonfeasance, not misfeasance, and for that the defendants as the local board are not liable: see per Willes, J. in *Parsons* v. *St. Mathew.* (1) In *Foreman* v. *Mayor of Canterbury* (2) the act for which the defendants were held liable was a misfeasance.

[BLACKBURN, J. The question is not whether the act was one of omission only or of commission; but whether there is any duty on the defendants for the violation of which an action will lie at the suit of the person injured by it. The ground of the decision in *Parsons* v. *St. Mathew* (1) was, that the duties and liabilities of the surveyor of highways were transferred to the vestry by s. 96 of 18 & 19 Vict. c. 120, and no more.]

That case then is directly in point for the defendants, as ss. 68 and 117 of 11 & 12 Vict. c. 63, only substitute the local board for the surveyor of highways, and impose no new liability upon them. *Gibson* v. *Mayor of Preston* (3) is directly in point, and is not touched by *Foreman* v. *Mayor of Canterbury.* (2)

[BLACKBURN, J. The question seems to be rather one of fact,—whether the keeping the grid in order is part of the duty of keeping the road in repair merely; or whether the grid can be said to be part of the property of the local board, in which case the defendants would be liable according to the principle of *Mersey Docks* v. *Gibbs.* (4)]

Appleton, for the plaintiff. It is unnecessary to dispute the points made for the defendants. There is a duty upon them, independently of their office of surveyors of highways. By ss. 43, 45, of 11 & 12 Vict. c. 63, the sewers are vested in the local board; and it is expressly found in the case that this grid and sewers are so vested.

[BLACKBURN, J. Is the grid part of the sewer or part of the highway? Possibly it is part of both: see *Hamilton* v. *St. George.* (5)]

The grid is certainly part of the sewer; though put there to drain the road, it would not be there but for the sewer, and it is part of the apparatus of the sewer.

Baylis, in reply. It must be admitted that, according to the

(1) Law Rep. 3 C. P. 56, 60.
(2) Law Rep. 6 Q. B. 214.
(3) Law Rep. 5 Q. B. 218.
(4) Law Rep. 1 H. L. 93.
(5) Law Rep. 9 Q. B. 42.

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definition in s. 2, this sewer became vested in the defendants; but the grid was put there as essential to drain the road, and it is therefore part of the road and not part of the sewer.

BLACKBURN, J. I am of opinion that judgment must be for the plaintiff. I think Mr. Baylis was right in the view he took; but that Mr. Appleton was also right in the view he took; which has not been displaced by what Mr. Baylis said in reply. Mr. Baylis, I think, is justified in saying that the local board, so far as they are surveyors of the highway, are not liable for the non-repair of this grid, because the inhabitants are the persons liable for the non-repair of the highway, and the local board are not substituted for the inhabitants, but are only made surveyors of highways; the decision of this Court in *Gibson* v. *Mayor of Preston* (1), and of the Common Pleas in *Parsons* v. *St. Mathew* (2), bears this out. Consequently, if they were simply charged for non-repair of the road the defendants would not be liable. But Mr. Appleton points out that the local board are not only surveyors of the highway, but also by ss. 43 and 45 (of 11 & 12 Vict. c. 63) all sewers in the district are vested in them; and consequently the local board fill two capacities, one as surveyors, the other as proprietors of the sewers. Now the placing of this grid over the opening from the road into the sewer evidently was done with two objects, the one to prevent the hole from being dangerous, the other, that while allowing the water to flow from the road into the sewer, the grating might prevent the stone and other matters from passing through; one purpose was, therefore a road purpose, the other a sewer purpose. And the grid being there for both purposes, the defendants have at least a joint liability with themselves as surveyors in their capacity of owners of the sewers. In the case of a trap opening from the highway into a cellar, I apprehend the parties having the care of the highways, or their servants, would be wrong if they allowed them to remain in a dangerous state; but the owners of the cellar would be under a liability to keep it so as not to be a nuisance; and a person injured from it being left out of repair would have a right of action against the owner of the cellar. The local board here are under the same obligation, as proprietors of the sewers, to keep these grids

(1) Law Rep. 5 Q. B. 218. (2) Law Rep. 3 C. P. 56.

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in due order, being put down for a purpose common to the highway and sewers. It appears that the grid in question had been left in a dangerous condition for six months. The defendants, therefore, are liable, at all events in their capacity of owners of the sewers.

FIELD, J. I have come to the same conclusion. I feel myself able to infer from the statement in the case, that this grid did serve a purpose connected with the sewer, and consequently the defendants are liable as the owners of the sewer.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Co.*

Attorneys for defendants: *Paterson, Snow, & Burney, for Wright & Appleton, Wigan.*

May 4.

WESTWICK *v.* THEODOR.

Master and Apprentice—Independent Stipulations—Misconduct of Apprentice—Discharge of Master's Obligation to instruct.

Declaration, that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea broker; and in consideration of 200*l.*, to teach him such business and pay him a salary, provided that he should obey all commands and give his services entirely to the business during office hours: Breach, that the defendant dismissed the son from his service. Plea: that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours without just cause, wherefore the defendant discharged him:—

Held, on demurrer, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good.

DECLARATION, that the defendant agreed with the plaintiff, as follows: "I hereby agree to take your son, T. B. Westwick, as an apprentice for three years from the 1st of December, 1873, to learn the business of a tea-broker, or merchant, and in consideration of the sum of 200*l.* paid to me by you, I agree to teach T. B. W. such business by the best means in my power, and further, agree to pay him a salary of 30*l.* 50*l.*, and 70*l.*, per annum, respectively for

the three years: provided always, that he obeys all commands and gives his services entirely to the business during office hours." Averment of conditions precedent: Breach, that the defendant did not teach T. B. W. in his business as aforesaid for the period and on the terms aforesaid, and before the three years dismissed T. B. W. from the service, and refused to retain him therein for the remainder of the term.

Plea: As to dismissing T. B. W., that after the contract and before breach, T. B. W. misconducted himself in the service by wilfully disobeying the reasonable and lawful orders of the defendant, by him given to T. B. W., in the service, and by habitually neglecting his duties in the service, and failing to perform the same, and by absenting himself from the defendant's service and refusing to give his services during office hours without just cause, and by acting and behaving with insubordination to the defendant so being his master; wherefore the defendant then discharged T. B. W. from the service, which is the alleged breach.

Demurrer to the plea and joinder.

Purvis, in support of the demurrer. The plea is bad. The apprentice's misconduct is no justification for the dismissal. The stipulations in the contract are independent. The master agrees to instruct the apprentice, and he is bound to perform his agreement; if the apprentice misconducts himself the master's remedy is by action. If the stipulations were not independent, the master could dismiss the apprentice the day after he entered his service, and retain the whole of the consideration: *Campbell* v. *Jones* (1); *Winstone* v. *Linn* (2); *Phillips* v. *Clift*. (3)

[BLACKBURN, J. In *Winstone* v. *Linn* (4), Bayley, J., says: "If the parties had intended that the master should have such a power," that is, a power to dismiss the apprentice, "they might have provided for it by the express terms of the deed." Here the defendant has agreed to teach the apprentice, provided he obeys all commands and gives his services entirely to the business during office hours.]

The stipulations, nevertheless, are independent according to the

(1) 6 T. R. 570.
(2) 1 B. & C. 460.
(3) 4 H. & N. 168; 28 L. J. (Ex.) 153.
(4) 1 B. & C. at p. 468.

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rule laid down in *Pordage* v. *Cole* (1), that where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant. The same rule is laid down in *Boone* v. *Eyre.* (2)

Francis, contrà, was not called upon.

BLACKBURN, J. It is unnecessary to hear counsel in support of the plea. It is true that the consideration is paid for the whole service, and that in general misconduct on the part of the apprentice would not put an end to the contract. The cases referred to during the argument support that contention. But in *Winstone* v. *Linn* (3), Bayley, J., in his judgment, points out that if the contract in express terms gives the master a power to dismiss the apprentice, the case would be different. I think here the contract provides that if the apprentice misconducts himself the master may dismiss him. I do not say that upon a fair construction of the proviso that one act of disobedience would be a breach of the condition, but we must look at the plea which must be taken to be true. The averment is, that the plaintiff's son wilfully disobeyed the defendant's orders, and habitually neglected his duties; I cannot say what amount of disobedience would justify a dismissal; it is a question of degree, which would be for a jury; but I am of opinion that the plea is good.

MELLOR, J. I am of the same opinion. The plaintiff's contention would be good, but for the proviso in the contract. The plea is good.

FIELD, J., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Noon & Tiddeman.*
Attorney for defendant: *Anthony Carr.*

(1) 1 Wms. Saund. 320c, note (4). (2) 1 H. Bl. 273, note.
(3) 1 B. & C. at p. 468.

EX PARTE ADAMS.

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April 26.

Attorney and Solicitor—Articled Clerk—Continuous Services under Articles—Assignment of Articles—6 & 7 Vict. c. 73, ss. 6, 12.

In September, 1870, A. was articled to his father, an attorney, for five years, and served to October, 1873, when the father, by an indenture of assignment, assigned all the service he had in A. to D., an attorney, for fifteen months, and A. served D. up to the expiration of that period, when he returned to his father and served him under the original articles for the remainder of the five years:—

Held, that the service under the assignment to D. could not be reckoned as part of the period of five years service required by 6 & 7 Vict. c. 73, ss. 6, 12.

APPLICATION on behalf of H. E. Adams, an articled clerk, that the period of fifteen months, under an assignment of his articles, should reckon as part of the five years service under articles of clerkship of the 6th of September, 1870.

April 15. *Lopes, Q.C.*, in support of the application.

The facts sufficiently appear in the judgment of the Court.

Cur. adv. vult.

April 26. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Field, JJ.) was delivered by

FIELD, J. In this case there will be no rule.

The application is on the part of Henry Elford Adams that the service under an assignment of his articles should reckon as part of the period of five years required by the statute in order to entitle him to be admitted as an attorney.

The facts are, that the applicant was on the 6th of September, 1870, articled to his father, Henry Cranstoun Adams, an attorney, for the statutory term of five years, and in the usual form. He served his father under those articles continuously up to the 2nd of October, 1873. On that day, by an indenture of assignment, Henry Cranstoun Adams (the master), at the request of the applicant (who was a party to the deed), assigned all the right, title, interest, duty, service, and demand which he the master had in or to the applicant to T. M. Dalton, an attorney, for fifteen months

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from that date; and from that time the applicant served Dalton as such clerk up to the expiration of that period, and at such expiration he returned to his original master's service, and has continued to serve him up to the present time—but such service has been under the original articles, which have never been cancelled—and the question is, whether the fifteen months' service with Dalton can be reckoned as a portion of the period of five years required by the statute.

Now, by s. 3 of the statute (6 & 7 Vict. c. 73), the applicant cannot entitle himself to admission as an attorney unless he has not only bound himself by contract in writing for five years, but also has "served under such contract" for and during that term; and by s. 12, the person who is so bound by contract to serve must, during the whole term of service, be actually employed by the attorney, with the exceptions specified in s. 6, which render pupillage and employment with a practising barrister or special pleader, or by the London agent of the master, for a period not exceeding one year equivalent. Upon these facts it seems clear that the applicant has not, to the extent of the fifteen months in question, fulfilled the conditions of the statute, for his service during that time was neither a service to the person with whom he entered into the required contract to serve for five years, nor was it under that contract; the employment and service were by and to Dalton, and under the assignment for fifteen months. A similar construction was in substance put upon the former Act, 2 Geo. 2, c. 23, in *Ex parte Hill* (1), in which it was held that service with another attorney with the master's consent was not a service within the statute.

Upon the argument of the rule, Mr. Lopes cited the case of *Ex parte Brutton* (2), in which no doubt expressions are used which tend to support the present application; but on examination of that case it appears that the Court drew the inference of fact that the service in question there, which was with Ford, was a service with and for the purposes of the original master, and the circumstances of the present case do not enable us to draw any similar inference, the service being expressly with Dalton and for

(1) 7 T. R. 456.

(2) 23 L. J. (Q.B.) 290.

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his purpose and profit; and in the recent case of *Ex parte Austin* (1), the Court, acting upon the construction of the statute to which we have above referred, unanimously refused a rule where the articled clerk had served the same master for the whole period, but under two distinct contracts of service. The judges in that case point out what is eminently true, that whilst the legislature has in ss. 3, 6, and 12, laid down what in its judgment it conceived to be the safeguards for securing a disciplinary and educational training, it has in s. 13 provided for cases where the rule would act injuriously; and in the case of *Ex parte Trenchard* (2) the majority of the members of the Court having drawn the conclusion of fact that the original articles had been in effect cancelled, so as to bring the case within one of the exceptions in s. 13, the application to reckon the time served under them was granted. But, again, there is no room for that conclusion here, the original articles having clearly remained in force the whole time.

We regret the conclusion at which we are obliged to arrive, as we think the applicant may have, and probably has had, the training required by the statute; but it has not been under the conditions imposed by it, and there is no alternative therefore but to refuse the rule. The statute is positive in its terms and specific in its exceptions, and unless the case falls within one of the latter we have no power to dispense with a compliance with the former. The rule must therefore be refused.

Application refused.

Attorneys for the applicant: *Whitakers & Woolbert.*

(1) 21 W. R. 390.

(2) Law Rep. 9 Q. B. 406.

1875
May 7.

THE QUEEN, on the Prosecution of JAMES ODAMS, Appellant, *v.* THE OVERSEERS OF WHADDON and Others, Respondents.

Poor-rate—Shifting Occupation of Land—Quarterly Rate—Working of Coprolites.

2 QBD 585
9 QBD 595

On an appeal by B. against a poor-rate for the parish of W., made in April, 1872, for the quarter ending the 24th of June, 1872 (the rates in W. being made quarterly) it appeared that, by an agreement, made in 1863, between A., the owner of lands in the parish of W. having coprolites in them, and B., A. authorizes B., to the exclusion of all other persons, to enter upon, hold, and use such lands for the purpose of digging, raising, and carting away the coprolites upon certain conditions:—B. consents to pay 11*l.* for every acre, and to dig such fields as shall be set out from time to time by A.'s agent, and to dig sufficient land to realise and pay to A. 1000*l* a year at the least, payable quarterly; and in case of not digging sufficient, B. is nevertheless to pay 1000*l.* per annum. B. undertakes to restore the surface soil and level the land after the coprolites have been dug out. In accordance with the agreement, B. digs ten acres at the least every year, at an average of two and a half acres per quarter. He is in possession of ten acres during at least one whole year, but of these ten acres only about one fourth is dug over and exhausted in each quarter, and one acre at least is always occupied by him for mills and tramways. Three acres and a half is the greatest quantity used by him at any one time for coprolite purposes, including mills, &c., and of the ten acres six acres and a half, from which the coprolites have been raised, are always lying unproductive. He is not necessarily in the occupation of the same ten acres during all the year, nor during the whole of any quarter, as his occupation is perpetually shifting, and he is taking on, from time to time, and yard by yard, fresh land at one end of his occupation and relinquishing it as and when levelled at the other end. The value of the occupation by B. of each acre of land for the purpose of raising coprolites is 11*l.*, and an hypothetical yearly tenant would give that for it. This value is realisable once only. The period from the time the coprolites are raised from any land until the land is levelled and restored by B. to the agricultural tenant varies from one to two years, but is never less than one year. After the coprolites have been removed until the land is so restored the occupation is valueless:—

Held (by Mellor, Lush, and Archibald, JJ.; Cockburn, C.J., dissenting), that B. ought to be rated in each quarterly rate in respect of ten acres at their enhanced or coprolite value.

In an appeal by James Odams against a poor-rate for the parish of Whaddon, of the 29th of April, 1872, to the Cambridgeshire quarter sessions, the sessions amended the rate, subject to a case:—

1. The appellant was rated in respect of ten acres of coprolite land at a gross rental of 84*0l.* and a rateable value of 63*0l.*

3. The poor-rates of the parish of Whaddon are usually made

quarterly, and the rate in question was estimated to meet all expenses which might be incurred for the purposes of the rate until the quarter-day then next ensuing, viz. the 24th of June, 1872.

4. The appellant is the managing director of the Patent Nitrophosphate or Blood Manure Company, Limited. By an agreement made the 18th of December, 1863, between the Earl of Hardwicke of the one part and the company of the other part, certain powers were conferred upon the company for the purposes of digging out and removing the coprolites under land in the parish, of which agreement the following are the material parts:—

1. The earl, being owner of lands in the parish of Whaddon, a portion of which are known to contain, at some depth from their surface, certain fossil stones usually called "coprolites," does hereby, for himself, &c., authorize and empower the company, their successors and assigns, to the exclusion of all other persons, to enter upon, hold, and use such lands on the conditions expressly named herein and subscribed to by the company, for the purpose of erecting such machinery as may be necessary, sinking wells, digging the ground, raising and carting away for their own use the coprolites, levelling the soil, and other purposes specified herein.

2. The company hereby consent to pay to the earl the sum of 11*l.* sterling for every acre, and so in proportion for every part of an acre that may be dug over by them for the purpose of raising the coprolites from any field or part of a field which may be set out by the earl, &c., or his agent. The land is to be dug for coprolites to the depth of thirteen feet, measuring from the surface of the soil. . . . In case the company shall be desirous of digging land and raising the coprolites from greater depth than thirteen feet, it shall be lawful for them so to do, paying 11*l.* per acre.

3. The company consent to dig over and raise coprolites from sufficient land in accordance with the conditions to pay to the earl the sum of 1000*l.* sterling per annum at the least, such sum to be paid quarterly at the usual quarter-days, the first instalment of 250*l.* to become due on the 25th of March, 1864; and in case the company shall dig land for the purpose of raising coprolites in excess of what may be required to pay the 1000*l.* per annum, then the excess shall be paid to the earl on the 25th of December in each year. But, in case the company shall not dig over sufficient land to amount, at the rate named per acre, to 1000*l.* per annum, the company nevertheless consent to pay to the earl such amount on the days named. . . .

4. The company consent from time to time to enter upon such field or parts of the same, as the earl may require, in which the coprolites may be proved to be, and to continue to raise them from such field until they are proved to be worked out, before they shall be entitled to require the earl to set out another field. Provided that, in setting out such field, a proper regard be paid to the convenience of the company in carrying on their works, and to the running of a proper outflow of water therefrom. . . .

5. The utmost extent of land that the company shall be entitled to lay claim

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to in any year ending the 25th of December, for the purpose of digging and raising coprolites, shall be ten acres, except by arrangement to be come to between the earl and the company.

6. After the company have entered upon a field, they shall work it out so that it may be restored to the level with as little delay as is compatible with the due execution of the work.

7. It is agreed that the company shall have no claim to use any part of a field upon which they enter for any agricultural purpose, but that with the exception of the field or fields which the company may be actually digging, the whole of the land shall be considered to be for the use of the tenant of the farm, and to be given up by a portion or portions only as the company shall require for the purpose of digging and raising the coprolites. . . .

8. The earl reserves to himself the right of keeping any field which is now pasture or orchard free from being dug over. . . .

9. The extent of acreage dug to be ascertained by a surveyor. . . .

10. The company shall be at liberty as soon as they enter upon any field, or part of the same, to dig such well or wells, and to erect such mill or mills, as may be necessary for the washing of the coprolites, filling up the holes and replacing the soil after the work is finished.

11. The company agree that in the digging of the land on any field the company will carefully remove, set apart, and preserve all the top soil to the depth of sixteen inches at the least, or more, should the mould prove to be beyond that depth, and shall from time to time after the field or part of the same shall have been dug over, and the subsoil shall have become sufficiently dry, distribute all the dead or subsoil which shall have been excavated so as to form a level surface fit and convenient for agricultural purposes, and shall then spread thereon such preserved top soil, and of an even layer as nearly as may be.

12. Power to the company to cut drains, filling them up after the work is complete.

13. As to making approaches when the field to be worked does not abut on a public road.

14. It is agreed that all arrangements with tenants necessary to the effectual prosecution of these presents and the compensation to the tenants for the temporary occupation of the lands by the company shall be made by the earl, who also agrees to reimburse the tenants for the discharge of all rates and taxes that may be chargeable upon the surface occupation of the land during the same period.

15. The company not to remove any stones, &c., or anything but coprolites.

16. In case the company shall be desirous of terminating this agreement before the lands of the earl in Whaddon parish that might be proved to contain coprolites shall have been dug over, the earl agrees to allow the company to do so upon giving three months' notice on any of the quarter days, and paying at the end of the three months 500*l.* as compensation for the breach of agreement. . . .

5. The following facts were agreed upon by the parties and found by the sessions:—

The sum payable for the exclusive privilege of digging and carrying away these coprolites by the company is 115*l.* per acre, and that sum is to be taken as the sum which an hypothetical tenant would pay for the right of digging and removing the coprolites under each acre of the land.

6. In the process of digging coprolites the following things are necessarily done:—As soon as a fresh field has been pointed out by the owner or his agent to the person licensed to dig coprolites, he commences operations at the point most convenient to himself, irrespective of any crops which may be growing on the land, and continues them in regular course until all the land containing coprolites in that field has been dug over. Wash-mills are put down, a trench is then opened from three to six feet wide, and of a convenient length; the surface soil is carefully put aside, and the subsoil is dug out until the coprolites are reached. The coprolites are then raised and washed in the mills, which are worked by means of portable steam engines. When the coprolites lying under the trench first opened have been raised, a fresh trench is opened parallel to the former, the surface soil removed and put aside, and the subsoil thrown into the trench first made; and this process is repeated and continued until all the land containing coprolites in that field has been dug over. As soon as a sufficient quantity of land has been dug to afford room for the operation parallel mounds are raised of a portion of the subsoil on that part of the land already dug, the tops of these mounds are flattened, and the surface soil barrowed upon them, and so much of the water in which the coprolites have been washed as has not been drained off, and which, from the quantity of soil adhering to the coprolites, forms a thick substance called slurry, is run off into the spaces between these mounds, called slurry pans, and is there evaporated or absorbed into the earth. As soon as the slurry has become sufficiently firm to support the surface soil, a portion of that soil is taken from the before-mentioned mounds and placed upon the dried slurry, and thus the whole of the ground from which the coprolites have been taken is levelled by the appellant, and the land becomes once more fit for cultivation, and is then restored by the appellant to the owner, or to his agricultural tenant. The period from the time when the coprolites have been

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raised, the mounds covered with surface soil, and the slurry pans filled, until the time when the land is ready to be levelled, varies from one to two years, but is never less than one year.

7. The company are not under the agreement entitled to, nor do they, in fact, use any part of the land taken by them under the agreement as agricultural land, nor for any other purpose than that of raising and washing the coprolites. From the time when the mounds have been completed and the spaces between them, or slurry pans, filled with slurry, all the coprolites having been dug out, no other beneficial use is or can be made either by the appellant or agricultural tenant of the land which has been dug until the appellant finally levels it. The only use (if any) made of the land in the interim is by the labourers in the employment of the agricultural tenant, who, without authorized permission, grow potatoes on the mounds on which the surface soil has been placed. Whenever a sufficient quantity of land dug over has become fit to be levelled and restored to cultivation, the appellant levels and restores it, which he is bound to do when required by the landowner, without regard to any potatoes which may have been so planted. The time occupied by the appellant to level one acre is about a week.

8. In the process of carrying on their works the company employ two portable steam engines which are capable of washing the coprolites obtained from ten acres in the course of one year, and the company do in fact dig at least ten acres in the course of one year, at an average rate of two and a half acres per quarter.

9. The appellant is in possession of ten acres of land during at least one whole year, but of this ten acres only about one fourth is dug over by him and exhausted in each quarter, and an additional area of at least one acre is always occupied by him for mills and tramways. The greatest quantity used by him at any one time for coprolite purposes (inclusive of the mills and tramways) is three and a half acres. There are always, during the continuance of the operations, six and a half acres of land from which the coprolites have been raised lying in the shape of mounds and slurry pans, making, together with the before-mentioned three and a half acres, the total quantity of ten acres not restored to the tenant, being the ten acres the appellant is charged for in the rate appealed

against. But the appellant is not necessarily in the occupation of the same ten acres of land during all the year, nor indeed during the whole of any quarter of a year, his occupation being a perpetually shifting one, and he taking on from time to time, and yard by yard, fresh land at one end of his occupation, and relinquishing, as and when levelled, at the other end.

10. The total value of the occupation of each acre of land for the purpose of raising coprolites is 115*l.*, and the hypothetical yearly tenant would give that sum. This enhanced or coprolite value is realisable once and once only. Till the land is dug for coprolites it remains at its ordinary agricultural value, and after the coprolites have been raised, it reverts to that value as soon as the operation of levelling has been performed, but till then it is nearly valueless. The time of occupation of each acre necessary for actually raising the coprolites therefrom is at most three months, and that is, in fact, the time actually taken for that purpose by the appellant.

11. The appellant, in the rate appealed against, was assessed as being in the actual occupation of the entire quantity of ten acres at the enhanced or coprolite value, and he contended that he ought not to be rated in respect of the whole ten acres at such enhanced value; first, because that was a larger quantity of land than he occupied at any one time; secondly, because before the rate was made he had dug and removed the coprolites from a large part of the land for which he was so rated; and, thirdly, because he was rated for a larger quantity of land than he would dig during the period for which the money raised by the rate was estimated to last; and that inasmuch as, at most, not more than one third of the ten acres was used by him at any one time or would be used by him within the last-mentioned period, he ought not to be rated for more than one third of the ten acres at such enhanced value.

12. The respondents contended that the appellant ought to be rated in each rate upon the annual rateable value of the whole ten acres as coprolite land, without reference to the mode in which he worked the land or the times at which he received the profits.

13. The sessions were of opinion that the appellant ought not to be rated in each rate upon the rateable value of the whole of the ten acres, as if it were of the enhanced value of coprolite land;

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but that he ought to be rated for 3*a.* 1*r.* 13*p.* at such enhanced value, making a rateable value in the whole of 210*l.*, and for the remainder of the ten acres, viz. for 6*a.* 2*r.* 27*p.*, upon a nominal value of 1*s.* per acre, and they amended the rate accordingly.

If the Court should be of opinion that the decision of the sessions was right, then the rate was to stand as amended by the sessions; but if the Court should be of the contrary opinion, then the order of sessions amending the rate was to be quashed, and the original rate to stand or be amended on such principle as the Court might direct.

Jan. 27. *Philbrick, Q.C.* (*Horace Browne* with him), for the appellant. The sessions were right in reducing the rate. The appellant is never in the beneficial occupation at any one time of more than three and a half acres at the most; nor does he occupy any specific ten acres in the course of the year. This is not like the case of an agricultural tenant who occupies the whole of a farm consisting of many acres, and makes a profit out of part only at one time; the farmer is in exclusive occupation of the whole, and at recurring times he has his harvest. Here the appellant's harvest takes place but once, and the land for his purposes is then exhausted. The appellant's right is more in the nature of a mere licence to dig coprolites at a royalty than the occupation of land; except so far as the one acre occupied by the mills, the appellant takes possession of the land bit by bit as he requires it, and the agricultural tenant remains in occupation up to the moment the excavation by the appellant commences. At all events, the most that the appellant is in the occupation of during any quarter—the period for which the rate is made—is three and a half acres.

Bulwer, Q.C. (*Heathcote, Mayd,* and *Lloyd* with him), for the respondents. The sessions were wrong in reducing the rate. It appears from the case that the appellant is, on any given day in the year on which a rate may be made, in the occupation—and, according to *Roads* v. *Trumpington* (1), the exclusive occupation—of at least ten acres from which coprolites have been raised, plus two and a half acres from which he is in the act of raising coprolites, plus one acre occupied by his mills. In the course of the year (paragraph 8) he does in fact dig at least ten acres, at an average rate of

(1) Law Rep. 6 Q. B. 56.

two and a half acres per quarter; and, as the period (paragraph 6) from the time when the coprolites have been raised, &c., until the land is ready to be levelled and restored to the owner or his agricultural tenant—that is, a period during which the appellant has exclusive occupation—varies from one to two years, but is never less than one year; it follows that, although the occupation is (paragraph 9) a shifting one, the appellant must in any quarter after the first year be in occupation for the whole quarter of the same ten acres at the least. In fact in the course of the year he is in occupation of at least twenty acres for periods varying from one quarter to four quarters. The total value (paragraphs 5, 10) of the occupation of each of those acres for the purpose of raising coprolites is 115*l.*, and the hypothetical yearly tenant would give that sum; and by the agreement (paragraph 4) the appellant is bound to raise coprolites sufficient to pay the landlord 1000*l.* per annum. Then, inasmuch as the rate must be made on the annual value of the hereditaments, the calculation is simple enough; unless it is to be said that a tenant of coprolite land worth 1000*l.* a year, who chooses or is bound to realise his profits in a particular manner or at particular seasons, is for that reason to pay less poor-rates than a tenant of agricultural land of the same value, who also can only realise his profits at particular seasons, would have to pay. The cases of *Reg.* v. *Westbrook* and *Reg.* v. *Everist* (2) as to the rating of brickfields, are decisive against any such argument. In those cases, it is true, the tenant took possession of the whole, say ten acres, at one and the same time. But that can make no difference; for while the process of working one acre was going on the remaining nine were worthless to him. So here, although the appellant takes possession of the ten acres, acre by acre, he remains in possession of the whole for at least one year. In the case of the brickfields it was the land not yet worked which was unprofitable to the tenant: in the present case it is the land which has been worked which is unprofitable. No difficulty would arise in rating coprolite lands (except, perhaps, in the first year of the occupation) if the parish officers made one annual rate instead of four quarterly rates.

Cur. adv. vult.

(1) 10 Q. B. 178; 16 L. J. (M.C.) 87.

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May 7. COCKBURN, C.J. The facts of this case were as follows:—By an agreement between the Earl of Hardwicke and the company, of which the appellant is the manager, the earl, being the owner of certain lands in the respondent parish containing coprolite, empowers the company to enter upon, hold, and use such lands for the purpose of raising and carrying away the coprolite, and erecting thereupon the machinery necessary for these operations in preparing the coprolite for use. The company, on the other hand, are to dig up the land, which is to be set out to them for that purpose, and get the coprolite, paying for the same at the rate of 11*l.* for every acre they dig up; and they are bound to take into use for the foregoing purpose a sufficient quantity of land to pay the earl 1000*l.* a-year; or if they shall fail to do so, at all events to pay to him that amount yearly. But they are to take the land only as they require it for the purpose of getting the coprolite, and actually commence this operation upon it for that purpose; until which time it is to remain in the hands of the owner or his agricultural tenant. Having extracted the coprolite from the soil, to effect which it is necessary that the soil to a considerable depth shall be dug up and removed, the company are bound to restore the soil, which by the process has been rendered wholly unfit for agricultural purposes, and level it, so as to render it again fit for such purposes; which done, they are to restore it to the owner. In point of fact the company excavate and operate upon about two and a half acres each quarter, in other words, about ten acres in each year. But not more than two and a half acres are being dug up and operated upon at any one time; to which, however, must be added an acre required for the purpose of mills used in their operations and of tramways. Although the company are in fact never in the actual use of more than three and a half acres for the purpose of getting the coprolite, yet, owing to the time required in restoring the land to its former condition, it results that the company are at all times in the occupation of about ten acres; of which, however, only about one-third is available for coprolite purposes, and is consequently by its occupation beneficial to the company. The occupation of the rest, being only for the purpose of fulfilling their obligation to restore the land to its original condition, is simply onerous. It is to be observed that, though there

is a constant occupation of ten acres, the occupation is a perpetually shifting one, the company, as they extend their operations acre by acre in the one direction, abandoning the land and restoring it to the owner in the other.

Under these circumstances a difficulty arises as to rating the company in respect of land so occupied. The parish authorities, on the ground that the company are, in the course of each year, in the occupation of land for which they pay on the average 1150*l.* to the owner, proceeded to rate them accordingly. Against the rate so made the company appealed, alleging that, though it was true that they paid that amount in the whole for the portions of lands successively occupied by them, yet they never were at any one time in occupation of more than three and a half acres of land which was beneficial to them, or, in fact, of any value at all. Adopting this view the court of quarter sessions allowed the appeal, and, while they maintained the rate in respect of the three and a half acres in use for the purpose of getting coprolite, they reduced it to a nominal amount as to the rest. The question for our judgment is, whether the court of quarter sessions were right in so deciding. In my opinion they were.

An occupier can only be rated according to the value of the property occupied; of which value, however, the rent which he actually pays, or which it may be taken that a supposed tenant would be prepared to pay, may be assumed to afford a fair estimate. Here it is clear that at the time the rate is made, the value of the six and a half acres to the company, as the occupiers of it, is nil. When it is said that, being in possession of ten acres, which in the course of the year have been capable of producing profit by reason of the coprolite contained therein, the company are liable to be rated in respect of the value which each part of the land may have been of during any part of the year, the answer, as it appears to me, is that the assessment must be made with reference to present, or, at all events, to prospective—not to past—value. If, indeed, the company at any time took possession of ten acres as a whole, with a view to working it by degrees, I should agree that so long as any of the land remained unworked they might properly be held to be assessable in respect of the whole, as its value as coprolite-producing land; just as a farmer is assessable in

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respect of his entire farm, though part of it lies fallow and unproductive. But when the facts are more carefully looked at the analogy between the two cases fails. Here the company do not, as it appears to be assumed, take ten acres and work them out in the course of the year; though it is, no doubt, true that by the end of the year they have worked out that extent of land. Here the company take possession of the land, bit by bit, acre by acre, as they require it; and, as they take fresh ground, the land behind becomes unprofitable and valueless to them; nor would they retain it but for the obligation to replace the soil.

When it is said that the company have themselves fixed the value of their occupation by agreeing to pay a minimum rent of 1000*l.* a year, a serious fallacy seems to me to be involved in this argument. The 1000*l.* is not agreed to be paid by way of rent, nor is rent to be paid in respect of any ten acres collectively. The rent —if, indeed, it can properly be called rent, and is not rather in the nature of a royalty—is payable in respect of each individual acre, as taken. The only purpose of the stipulation as to the 1000*l.* is to insure that a given quantity of land shall be worked in each year. No rent is paid for any ten acres occupied simultaneously; but, as I have already pointed out, the rent is paid for a single acre and no more.

The test of what the hypothetical tenant of the Assessment Act would give by way of rent cannot here avail the respondents, but the contrary. A tenant would not agree to give 115*l.* for the right to take fresh land into working, if he were to be saddled with the serious cost of restoring six and a half acres of land already worked out by someone else. All that he would do would be to give that price if placed in the same position as the appellants were in when they first began their operations on entering on the first acre. The consideration for the right of working each acre is the amount agreed to be paid, plus the engagement to restore the soil. The consideration for which the company agree to restore the soil is that of first extracting the coprolite. A fresh tenant would not undertake the profitless cost of restoring land which he had not had the opportunity of working. I come back, therefore, to the position I first took, namely, that the appellants, while occupying ten acres at the time of the making of the rate, occupied only three

and a half acres assessable at the higher value, and, consequently that the Court of quarter sessions were right in reducing the rate in respect of the residue. I regret to arrive at that conclusion, because I think that, in justice and equity, each acre should pay according to its increased value, but the case appears to me an anomalous one, and one which the existing law cannot reach without being strained in a manner in which we ought not to strain it.

I think, therefore, that the Court of quarter sessions were right, but, as my learned Brothers think otherwise, the order made on the appeal must be reversed.

MELLOR, J. My Brothers Lush and Archibald concur in the judgment I am about to deliver.

The Earl of Hardwicke is the owner of lands in the parish of Whaddon, which contain a considerable depth of fossil stones, called "coprolites," and, as such owner, he agreed to authorize and empower the appellant, to the exclusion of all other persons, to enter upon, hold, and use certain of such lands, and to dig, raise, and cart away the coprolites contained in such lands for his own use; the appellant levelling the ground and restoring it in manner and upon the terms contained in the agreement.

On an appeal to the sessions against the rate made upon the appellant in respect of such land, the court of quarter sessions amended and reduced the rate, subject to a case to be stated for the opinion of this Court.

From the case it appears that the appellant employs two portable steam-engines, which are capable of washing the coprolites obtained from ten acres in the course of one year, and does, in fact, dig at least ten acres in the course of one year, at an average rate of two and a half acres per quarter. The appellant is in possession of ten acres of land during at least one whole year; but of these ten acres only about one fourth is dug over by him and exhausted in each quarter, and an additional area of at least one acre is always occupied by him for mills and tramways. The greatest quantity used by him at any one time for coprolite purposes, inclusive of the mills, &c., is three and a half acres. There are always, during the continuance of the

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operations, six and a half acres from which the coprolites have been raised, lying in the shape of mounds and slurry, making, together with the before-mentioned three and a half acres, the total quantity of ten acres not restored to the tenant from whose farm the same is taken. The appellant is not necessarily in the occupation of the same ten acres of land during all the year, nor indeed during the whole of any quarter of a year, his occupation being a perpetually shifting one, and he taking on, from time to time, and yard by yard, fresh land at one end of his occupation, and relinquishing it as and when levelled at the other end. The total value of the occupation of each acre of land for the purpose of raising coprolites is 115*l.*, and the hypothetical yearly tenant would give that sum for it. This coprolite value is realizable once and once only. It appears by the agreement, which is made part of the case, that the field or fields to be dug are set out by the agent of the owner, and the appellant is bound to dig sufficient land for coprolites so as to realise and pay to the proprietor the sum of 1000*l.* sterling per annum at least, payable quarterly; and in case of failure of the appellant to dig sufficient land to realise that amount, he is nevertheless bound to pay that sum to the owner; and in like manner, the appellant is to pay rateably for any excess of land dug in any year. The rates for the relief of the poor are made quarterly in the parish of Whaddon.

It was not contended that there was not a rateable occupation by the appellant of land itself being convertible into a source of profit: *Roads* v. *Trumpington* (1); *Rex* v. *Alberbury* (2); but it was said that, inasmuch as the appellant only actually used two and a half acres in any one quarter for the profitable purpose of getting the coprolites, and one acre for placing the machinery necessary to get them, he was only rateable at a coprolite value, in any one quarter, in respect of the land so actually used, and for which the hypothetical tenant would give the rent of 115*l.* per acre; and that the sessions were right in amending the rate on that basis.

On the part of the respondents, it was contended that the appellant, being in the exclusive occupation during the year of ten acres of land capable of producing and actually producing coprolites during the year of the value of 115*l.* per acre, at an annual

(1) Law Rep. 6 Q. B. 56. (2) 1 East, 534.

payment to the owner of at least 1000*l.* sterling per annum, payable quarterly, and which rent or payment the hypothetical tenant would give for the use and occupation of such ten acres, with the privileges attached thereto of getting coprolites, during the year, it was not material that the actual profitable user of ten acres did not extend beyond three and a half acres in any one quarter of a year, or that the actual user and occupation was constantly shifting as the coprolites were worked out; and that the overseers were justified in rating the appellant upon the whole ten acres, as land capable of yielding during the year, from the getting of the coprolites, the annual sum of 1000*l.* at the rate of 115*l.* per acre.

I am of opinion that the contention of the respondents is correct.

The appellant is found by the case to have the exclusive possession during the year of ten acres of land, the area of which is constantly shifting as the work progresses, and the appellant does in the course of the year dig the entire ten acres, and obtains therefrom a valuable property in the shape of coprolites, and for which he is bound to pay 1000*l.* per annum at least to the owner, payable quarterly. I cannot see how the fact, that by the course of his working he only actually uses three and a half acres during any one quarter, makes any difference in the mode or extent of his liability to be assessed to the poor rate. The annual value of his occupation is the same, although by the course of his working he only actually uses three and a half acres out of ten during any one quarter of a year, the fact being that during the year over which his occupation extends he actually does work the entire ten acres, and produces the profit which enables him to pay the stipulated rent or payment of 1000*l.* per annum to Lord Hardwicke, and for which the hypothetical tenant would pay at the rate of 115*l.* per acre.

The rate must be made on the net *annual value* of the several hereditaments rated thereunto, and therefore it cannot be made upon the net quarterly value of the hereditament liable to the rate; and it appears to me that the net annual value of the hereditament is the same whether the profit is earned wholly in one quarter of a year or spread over the year. I cannot distinguish the present case upon this point from an ordinary agricultural

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farm, in which the net annual value is the same, although the one part of the farm may lie fallow, or be a source of expense at one period and of profit at another, notwithstanding which the rate must be made upon the farm in respect of its net annual value.

The contention of the appellant would produce this result: that, although in the course of the year the profit earned from the whole ten acres would amount to ten times 115*l.* or 1150*l.*, the rate would be made in each quarter, not upon the net annual value which the hypothetical tenant would give for the occupation of the ten acres for a year with the privilege of getting the coprolites, but upon an arbitrary division of the ten acres into four portions of two and a half acres each, which alone, by the arrangement between the parties, could be profitably worked during any quarter of a year; so that ten acres of land, yielding coprolites of the value of 115*l.* an acre throughout the whole year, and thereby realising the yearly payment of 1000*l.* per annum at least, and otherwise properly rateable to the poor rate at that annual value, are, by the effect of a particular mode of converting the ten acres, to be rated, not upon the annual value, but upon some arbitrary value by the quarter. I cannot but think that is a mode of rating in direct violation of the Parochial Assessment Act, which requires every rate to be made upon the annual value of the hereditaments rated thereto.

The case in the argument for the appellant was treated as if, by the agreement, a mere licence to dig coprolites at a royalty was granted, and as if there was no exclusive occupation of more than two and a half acres of land, either for the purpose of getting coprolites, or for the use and occupation of at least an acre during the year as the site of the mills and tramways. But in truth, the appellant had the exclusive occupation during the year of ten acres of land with the privilege of digging it for coprolites, at a yearly rent or payment of 1000*l.* per annum at least, and it being admitted that a yearly tenant would give that rent or annual payment for it. I cannot see why the parish should lose the benefit of an area of ten acres, each of equal value, and together realising a rent or sum of 1000*l.* during the year, for the purpose of rating to the poor rate, because the parties, by an ingenious arrangement as to the mode of working, make only one fourth profitable during any one

quarter of a year, and the other six and a half acres, out of which the coprolites have been got during the year, either unprofitable or a source of expense.

I think that, inasmuch as the lessee had the benefit of the actual and exclusive occupation of ten acres during the year, and realized out of each acre the proportion of the agreed annual rent or payment, he can set up no claim to reduce the annual value of the whole, because, in realising the profit out of the ten acres, he has reduced six and a half acres to a condition either unprofitable or a source of expense.

I am therefore of opinion that the sessions were wrong in reducing the rate; and that the respondents are entitled to judgment.

Order of sessions quashed and original rate affirmed.

Attorneys for appellant: *Walters & Gush, for Carver, Royston.*

Attorneys for respondents: *Church, Son, & Clarke, for Thurnall & Nash, Royston.*

LEWIS, APPELLANT; ARNOLD, RESPONDENT.

May 1.

The Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 33—"*Owner of Lands and Buildings*"—*Expenses incurred for the use of Fire Engine.*

By s. 33 of the "Town Police Clauses Act, 1847" (10 & 11 Vict. c. 89), the commissioners may send engines with their appurtenances and firemen beyond the limits of the special Act for extinguishing fire in the neighbourhood of the limits: and the owner of the lands and buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, &c.:—

Held, that the occupier was the owner of lands within the meaning of the above section, and liable for the expenses incurred in sending an engine to extinguish a fire at a haystack belonging to him.

CASE stated by justices of Kent, under 20 & 21 Vict. c. 43.

A complaint was preferred before the justices at petty sessions holden at Tunbridge Wells by the appellant, as clerk to the local board for the town of Tunbridge Wells, being a district to which the Public Health Act, 1848, and the Local Government Act,

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1858, have been duly applied, against the respondent, under s. 129 of the Public Health Act, 1848, charging that the commissioners of the local board did send, pursuant to s. 33 (1) of the Town Police Clauses Act, 1847, to a haystack in the parish of Tunbridge, and of which haystack the respondent was the owner, a certain fire engine, with its appurtenances and firemen, for the purpose of extinguishing a fire there: that in so sending the engine with its appurtenances and firemen the commissioners had incurred certain costs, charges, and expenses, amounting to 12*l.* 7*s.*: and that a difference had arisen between the commissioners and the respondent as to the liability of the respondent to pay the costs, charges, and expenses, as well as the propriety of sending the engine and firemen.

It was proved that on the 9th day of August, 1873, an order was received at the police station at Tunbridge Wells from a labourer in the respondent's service, but having no direct authority from the respondent for that purpose, that the town fire engine was to go to Southborough, which is outside the town of Tunbridge Wells, to extinguish a haystack belonging to the respondent which was on fire there. The engine with its appurtenances and firemen was at once dispatched to Southborough, was set to work, and played upon the haystack till the water supply was exhausted, when the engine and firemen returned to Tunbridge

(1) By s. 2 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the expression "the special Act" shall mean any Act which shall be hereafter passed for the improvement or regulation of any town or district defined or comprised therein, and with which this Act shall be incorporated; and the expression "the commissioners" shall mean the commissioners, trustees, or other persons or body corporate instructed by the special Act with powers for executing the purposes thereof.

Sect. 33: "The commissioners may send such [fire] engines with their appurtenances and the firemen beyond the limits of the special Act for extinguishing fire in the neighbourhood of the said limits: and the owners of the lands and buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the commissioners a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen; and in case of any difference between the commissioners and the owner of the lands and buildings, the amount of the expenses and charge, as well as the propriety of sending such engines and firemen as aforesaid for extinguishing such fire, shall be determined by two justices . . ."

Wells, leaving the stack to burn itself out. It was admitted that the respondent was the occupier only of the land on which the haystack was standing, and that there were no buildings of which he was either owner or occupier in danger of taking fire. An account of the charges made by the local board for the use of the engine, for the attendance of the firemen, and of the actual expenses which the board had incurred in so sending the engine and firemen, was made and delivered to the respondent, who refused to pay them.

It was objected on behalf of the respondent that the justices had no jurisdiction, as s. 33 of the Town Police Clauses Act, 1847, which is incorporated with the Local Government Act, 1858, whilst authorizing the commissioners to send their fire engine beyond the limits of the town, enacts that the owner of the land or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, &c., and that as the respondent was not the owner of the land on which the stack was standing, but only the owner of the stack itself, he was not within the terms of the Act, as a haystack could not be held to be a building.

The justices were of opinion that the engine and firemen had been properly sent to the fire, and that the charges made for the use of the engine, for the attendance of the firemen, and for the expenses incurred, were fair and reasonable. They were also of opinion that the word "building" in the Town Police Clauses Act, 1847, could not be so construed as to include a stack of hay, and as it appeared that the respondent was not the owner of the lands or buildings where the fire happened, they dismissed the complaint.

The question for the opinion of the Court was, whether, under the true construction of s. 33 of the Town Police Clauses Act, 1847, the local board were entitled to recover from the respondent the charge for the attendance of the engine.

H. Matthews, Q.C., for the appellant. The question is, whether the occupier of land, who has a haystack which is burnt down, is liable to pay for an engine which was sent to extinguish the fire. By s. 33 of the Town Police Clauses Act, 1847, the expenses in-

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curred in sending an engine are to be defrayed by "the owner of the lands and buildings where such fire shall have happened." It is conceded that a haystack is not a building, but "owner of the lands and buildings" means occupiers of the lands and buildings. The word "owner" has no technical meaning; it means a person who has some interest in the land, and to whom the fire is an injury. It does not mean a person who has a freehold interest or a term of years; it means one who has any interest in the land, and is used as equivalent to occupier. It cannot be intended that the landlord should defray the expenses of extinguishing a fire; it is reasonable that the tenant who is the owner or occupier of the farm—the person in possession—should be liable to them.

F. H. Scott, for the respondent. The words of s. 33 are "owner of the land and buildings;" the respondent is not the owner, and therefore he is not liable.

MELLOR, J. I am of opinion that "owner of lands and buildings" in s. 33 includes the occupier, and that the justices were wrong in dismissing the information.

LUSH, J. I also am of opinion that the occupier is "the owner of lands and buildings" within the meaning of s. 33.

QUAIN, J., concurred.

Case remitted accordingly.

Attorneys for appellant: *Carr, Bannister, Davidson, & Morris.*
Attorneys for respondent: *Scott, Jarmain, & Co.*

THE NORTH OF ENGLAND PURE OIL-CAKE COMPANY *v.* THE ARCHANGEL MARITIME INSURANCE COMPANY.

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April 30.

*Policy of Marine Insurance, Assignment of—Assignment after Interest of Assignee had ceased—*31 & 32 *Vict. c.* 86, *s.* 1—*Sold-note, Construction of.*

On the 24th of November, 1871, V. Brothers insured with defendants in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call and discharge in the U. K. to be named, including all risks of craft or lighters to and from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers and their assigns. The linseed was shipped under a bill of lading, whereby it was to be delivered at a safe port in U. K. to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on the 17th of February, 1872, sold in London to plaintiffs the cargo of linseed; by the sold-note the seed was to be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in U. K. The bill of lading was indorsed to plaintiffs. On the 21st of February, plaintiffs named a safe floating port, and on the arrival of the brig at the port the cargo was landed by public lighters employed by plaintiffs; on the 28th of February, one of the lighters was sunk off the plaintiffs' wharf, being a loss within the terms of the defendants' policy. The loss occurred when part only of the cargo had been discharged, and before plaintiffs had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to plaintiffs; and on the 17th of October V. Brothers indorsed on it an assignment to plaintiffs, and they brought an action upon it to recover for the loss of the seed in the lighter:—

Held, that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and V. Brothers' interest ceased and the policy lapsed; and the subsequent assignment by V. Brothers to plaintiffs was, therefore, of no avail under 31 & 32 Vict. c. 86, s. 1.

CASE stated by consent after issue joined.

1, 2. The action is brought to recover 77*l.* 4*s.*, with interest, on a policy of insurance.

3. The plaintiffs carry on the business of seed crushers at Stockton-on-Tees, one of the ports of the United Kingdom, and have a landing-wharf there; and the defendants carry on, at Athens, in the kingdom of Greece, the business of marine insurance on ships

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and cargoes, and have also offices and a local board of direction in London for conducting and carrying on such business.

4. On the 24th of November, 1871, Vagliano Brothers insured with the defendants a cargo of 2950 chetwerts of linseed belonging to them, of the value of 6200*l.*, for the sum of 1500*l.*, at a premium of 52*l.* 10*s.*, which Vagliano Brothers then paid to the defendants, the linseed then being on board the brig *Fanny* at Constantinople, for a voyage from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risks of craft or lighters to and from the said brig, each lighter and craft being considered as if separately insured, the policy of insurance being expressed to be with Vagliano Brothers and their assigns.

5. The linseed had been duly shipped by Vagliano Brothers on board the brig, which then commenced the voyage in conformity with the terms of the policy, under a bill of lading dated the 29th (10th) of November, 1871, whereby the linseed was to be delivered at a safe port in the United Kingdom unto Vagliano Brothers or their assigns.

6. Whilst the brig was still on her voyage, Edwards & Co., who then acted as the agents of Vagliano Brothers in England, on the 17th of February, 1872, sold to the plaintiffs the cargo of linseed.

The following are the material parts of the sold-note:—

"London, 17th February, 1872.

"Sold this day to the North of England Pure Oil Cake Company, Limited, the following Taganrog linseed, viz. the cargo per *Fanny*, consisting of about 2448 quarters, and now at Scilly, at 62/3 (sixty-two shillings and three pence) per 424 lbs. The seed is to be delivered at destined port in sound merchantable condition, and to be worked in thirteen days, and paid for in fourteen days from being ready for delivery by cash, less 2½ per cent. discount, or at seller's option, on handing shipping documents, less interest at 5 per centum per annum. . . . The vessel to go to any safe floating port in the United Kingdom. Should the whole or any portion of the above-named seed be sea or otherwise damaged, the same is to be taken with an allowance, which, together with any dispute arising out of this contract, shall be settled by arbitration in London; and should any portion of it be found damaged equal

to 15 per cent. on the above price, such seed shall be taken as part of the contract at the fair valuation of the day, to be fixed by the arbitrators. . . . ."

7. The plaintiffs ultimately paid Vagliano Brothers, through Edwards & Co., the price of the linseed in cash, less 2½ per cent. discount, in conformity with the sold-note. (1) On the 21st of February, 1872, Vagliano Brothers indorsed the bill of lading to the order of Messrs. Edwards & Co., who indorsed the same to the plaintiffs. The sellers of the cargo did not exercise their option mentioned in the contract note.

8. The plaintiffs duly notified Stockton-on-Tees (being a safe floating port within the terms of the policy) as the destined port of discharge of the cargo; and on the 26th of February, 1872, the brig duly arrived at the port with her cargo then intact.

9. The cargo was landed by means of public lighters employed by the plaintiffs to unload the cargo from the brig and to land the same at the plaintiffs' wharf. The employment of the lighters was within the terms of the policy, and was necessary for unloading and right delivery ashore of the cargo.

10. On the 28th of February, 1872, one of the lighters filled with part of the cargo arrived safely alongside of the plaintiffs' wharf, and was there sunk by perils within the terms of the policy, and thereby the same was partly lost and partly damaged.

11. The above-named loss occurred when a part only of the cargo had been discharged, and before the plaintiffs had paid the price of the cargo.

12. On the 4th of March, 1872, Vagliano Brothers made a claim on the defendants for the loss of the linseed in the lighter, and on the 5th of March, 1872, claimed and received from them a sum of money as return of premium, on the ground that the brig had arrived at Stockton-on-Tees. They retained the same, and no demand for the same has ever been made by the plaintiffs. This return of premium is indorsed on the policy; such return of premium does not, by the usage at Lloyd's, preclude the assured from afterwards claiming a loss upon the policy, if any loss has in fact occurred.

(1) The date of the payment nowhere appeared in the case.

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13. On the 11th of May, 1872, a claim for 77*l.* 4*s.* in respect of the loss was made by Vagliano Brothers and was indorsed on the policy.

14. The policy was in June, 1872, handed over to the plaintiffs by Vagliano Brothers, and on the 17th of October, 1872, Vagliano Brothers indorsed on the policy an assignment of it by them to the plaintiffs.

15. The Court is to have power to draw inferences.

The question for the opinion of the Court is, whether upon the above facts the plaintiffs are entitled to recover from the defendants the said loss.

Butt, Q.C. (with him *Bohn*), for the plaintiffs. By 31 & 32 Vict. c. 86, s. 1, a policy of insurance can now be assigned so as to enable the assignee to sue in his own name, and this assignment may be made after the loss: *Lloyd* v. *Fleming.* (1) The property in the cargo passed to the plaintiffs on the execution of the sold-note, and this, it is to be observed, was a contract made in London for the sale of a cargo at sea. In 1 Arnould on Marine Ins., p. 106, 4th ed., it is said: "When a floating cargo (i.e. a cargo at sea) is sold in London, it is generally on what are called the 'London floating conditions,' which comprise the delivery over to the purchaser for his benefit of the policies which have been effected on the cargo, the understanding being that it is insured to the full value, the price paid being all the higher, to include the amount paid by the vendor for insurance. . . . . Where a cargo of wheat, still afloat, was sold at a depreciated price, and the vendor indorsed over the policy for so much only as would cover the depreciated price, being part merely of the sum insured in a valued policy, it was held as a matter of construction on the bought-note, taken in connection with the existence of the policy at the time of the contract, that the buyer was entitled to the policy for the full sum at which the wheat was originally insured under it," citing *Ralli* v. *Universal Marine Insurance Co.* (2) Primâ facie it would be an unreasonable construction of the contract of sale of a cargo exposed to sea risks and covered by a policy of

(1) Law Rep. 7 Q. B. 299.

(2) 2 J. & H. 159; 4 De G. F. & J. 1; 31 L. J. (Ch.) 207, 313.

8 Jur. N.S. 227, 495.

insurance, that the vendor intended to absolve the underwriters and allow the policy to drop. Payment in exchange for "shipping documents" always includes any policy existing, and in some cases it may be a question whether a vendor is not bound to tender a policy sufficient to cover all the cargo, though such does not exist: *Tanvaco* v. *Lucas.* (1)

[QUAIN, J., referred to *Powles* v. *Innes.* (2)]

When the interest is assigned the policy drops, but it will not drop so long as any interest remains in the vendor.

[LUSH, J. The plaintiffs took delivery by sending their lighters, so that as soon as the linseed was on board the lighter the vendors' interest had ceased.]

Only in that particular part; and the vendors had an interest up to the date of handing over the policy by reason of their unsettled account for the cargo. There is no case that part of a policy can be assigned. [He also referred to *Hurry* v. *Royal Exchange Assurance Co.* (3); *Ebsworth* v. *Alliance Insurance Co.* (4); *Anderson* v. *Morice.* (5)]

W. Williams, Q.C. (with him *Crompton*), for the defendants. There is nothing in the contract of sale to imply that the policy was to be assigned for the plaintiffs' benefit; and if so, on the delivery of the goods, Vagliano Brothers' interest was at an end, and the policy dropped. This is not the case of a sale as on London floating conditions; the insurance in those cases is taken into consideration in the price. Here the sellers' interest under the policy continued till the delivery, for they were only to be paid on delivery of the cargo; consequently it is clear that the policy was not intended to be assigned for the plaintiffs' benefit.

Butt, Q.C., in reply.

COCKBURN, C.J. We are agreed on one point, which entitles the defendants to judgment, viz. that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible. If there had been a stipula-

(1) 1 B. & S. 185; 30 L. J. (Q.B.) 234; in error 3 B. & S. 89; 31 L. J. (Q.B.) 296.
(2) 11 M. & W. 10.
(3) 2 B. & P. 430.
(4) Law Rep. 8 C. P. 596.
(5) Law Rep. 10 C. P. 58.

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tion in the contract of sale that the policy should be assigned for the benefit of the plaintiffs, the vendees, it might have been otherwise; but not only is there no express stipulation to that effect, but the implication from the nature of the contract is the other way. This is not like the common case of the sale of a floating cargo, where the seller parts with and the buyer takes at once the property, and all risks. In such a case, the policy, according to the established practice, passes as part of the shipping documents, and on assignment the vendee can sue upon it in case of loss. And there is no hardship in this on the insurers, because they insured the safety of the cargo to the end of the voyage, and it is immaterial to them in whom the interest vests at the time of the loss; and there is great convenience in the practice, as it obviates the necessity of the vendee getting a fresh policy and facilitates the sale of cargoes at sea. But this is not an out-and-out sale; on the contrary, although the sale might at once transfer the property to the vendees, yet an essential term of the agreement was that payment was only to take place on the right delivery of the cargo, so that the interest, a substantial real interest, remained in the sellers. If the cargo had perished at sea, the sellers would not have got one shilling; therefore until delivery to the plaintiffs, the buyers, the interest in the policy remained in the sellers. But on the delivery to the plaintiffs the sellers became entitled to payment and their interest in the policy ceased; and the policy was at an end. Consequently, although an actual assignment may be good after the loss, in the present case the assignment was not in consequence of a previous agreement before the policy dropped, and therefore the sellers had no interest in the policy, and nothing to assign.

LUSH, J. I am of the same opinion. It is clear the contract of sale did not confer any interest in the policy on the plaintiffs; and the mention of shipping documents in such a contract would not of itself without more include the policy. If, then, the policy were not agreed to be assigned before the sellers' interest ceased by the delivery on board the lighters, an assignment after that interest had ceased could not create an interest in the plaintiffs. The

right to sue in the original owner's name was by virtue of the interest which had been agreed to be passed from the one to the other; and the right given by the statute to sue in the assignee's own name only applies in cases where he could have sued in the vendor's name.

QUAIN, J. I am of the same opinion. *Powles* v. *Innes* (1) is directly in point for the defendants. On the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly. The only question, therefore, which it is necessary to decide in the present case is, whether there is any stipulation express or implied in the sale-note from Vagliano Brothers to the plaintiffs. Express stipulation is out of the question; and none can be implied from the nature of the contract. On the contrary, it was a mere accident that the plaintiffs took delivery by lighters from the ship's side; this was clearly not anticipated at the time of the contract. The mention of the delivery of "shipping documents" can have no application to the policy in such a case. There was, therefore, no policy contemplated that should be kept alive for the benefit of the vendees, while the interest in the vendors remained; and the law is clear that a subsequent assignment cannot operate to give the assignee an interest in the policy.

Judgment for the defendants.

Attorneys for plaintiffs: *Sharp & Ullithorne.*
Attorneys for defendants: *Courtenay & Croome.*

(1) 11 M. & W. 10.

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April 22.

MITCHELL AND OTHERS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company—Carriers—Warehousemen—Advice-note: we hold "not as Common Carriers but as Warehousemen, at Owner's sole Risk, and subject to usual Warehouse Charges."

10 Q.B.D. 321
322.
5 Q.B.D. 179

The plaintiff was consignee of some flax sent by the defendants' railway to N. station. On its arrival at N. station, defendants sent to plaintiff an advice-note of its arrival, requiring him to remove it, and stating that they, defendants, would hold it "not as common carriers but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges."

Soon after the receipt of this notice, the plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, and the flax remained on open ground insufficiently covered, and became damaged by wet.

In an action for the damage it was admitted that, if the defendants were bound to take reasonable care of the flax, they had not done so:—

Held, that, treating the advice-note acquiesced in by the plaintiff as a contract, the terms of it, taken altogether, did not exempt the defendants from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and that they were therefore liable for the damage.

FIRST COUNT, that the defendants received and held, as warehousemen for the plaintiffs, sixty bags of tow and flax to be taken care of by the defendants for reward in that behalf; that defendants took so little care and acted so negligently about the premises that the tow and flax was wetted and spoiled.

Second count, that the tow and flax was held by the defendants as warehousemen at plaintiffs' sole risk and subject to the usual warehouse charges, yet defendants were guilty of gross and active negligence, and did not take the care of the tow and flax which they might reasonably have been expected to take if the tow and flax had been their own, and acted so carelessly, &c., that the tow and flax were wetted and injured.

Third count, that the defendants were possessed of the tow and flax as warehousemen, and that it was in a yard covered with tarpaulin, and so protected from the rain, and the defendants negligently removed the tarpaulin, whereby, &c.

Pleas 1—3, to each count respectively, that the defendants did not receive the tow on the terms alleged. 4. Not guilty.

Issue joined.

On the trial at the Liverpool spring assizes, 1874, before Denman, J., it appeared that about the 25th of July, 1873, sixty bags or bales of flax or tow arrived at the defendants' Newchurch station by their railway, consigned to the plaintiffs, who are felt manufacturers in that neighbourhood; and the next day the defendants' agent forwarded to the plaintiffs the following advice-note:—

"Lancashire and Yorkshire Railway, Newchurch Station,

"Advice of Goods. July 26, 1873.

"Messrs. Mitchell,—The undermentioned goods, consigned to you, having arrived at this station, I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges in addition to the charges now advised. When you send for the goods please to send this note. . . .

"For the Lancashire and Yorkshire Railway Company.

"J. Taylor, Agent.

"Sixty bags flax," weight, freight, &c., carriage so much. Paid out so much. "Total to pay, 15*l.* 11*s.* 1*d.*"

Nine bales of the tow were taken by the plaintiffs' carter at once on the 25th of July, and soon after the receipt of the notice one of the plaintiffs went down to the station and ordered some more (two tons in all) to be removed. There were no warehouses at the station, and the plaintiff saw how the tow was stacked; at that time the weather was fair. In consequence of the tow not being according to sample, and not being suitable for the plaintiffs' manufacture, they refused at first to accept it, and told the defendants' manager they were not the owners; afterwards the plaintiffs arranged to take it. But when it was removed from the station (which was in the second week in October) it was found to be completely spoilt by wet. The tow had been stacked in the open air, and it had not been placed, as it ought to have been, on planks or something to raise it from the wet ground, and the tarpaulins put over it were insufficient and let the rain through. It was admitted that, if the defendants were bound to take reasonable

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care in keeping the tow, they had not done so; and a verdict was returned for the plaintiffs for 115*l.*, with leave to move to enter a verdict for the defendants, if there was no evidence on which the jury could properly find for the plaintiffs.

A rule having been obtained accordingly,

Crompton shewed cause. First, there was ample evidence of a contract between the plaintiffs and defendants; and the question is what the terms of the advice-note mean. "Not as carriers but as warehousemen, at owner's sole risk" means, We will be liable as warehousemen only for negligence, and all other risks must be taken by the owner. But even if "at owner's sole risk" be interpreted to absolve the defendants from the obligation to take any care whatever in keeping the goods, still it would not absolve them from taking proper care in the original stowage; and the flax was never properly stored at all.

[FIELD, J. The plaintiffs' contention is that there was a duty, which the defendants could not get rid of when they received the goods as carriers, to put them into a proper place and position.]

Yes; and therefore that they are not protected from liability, even if the Court should interpret this note as absolving them from all liability for negligence in the keeping of the goods. "At a person's own risk," has received an interpretation in *McCawley* v. *Furness Ry. Co.* (1), as absolving the carrier from all liability for negligence; but that was the case of a passenger, and is not in point as to the interpretation of this notice. The same may be said of *Gallin* v. *London and North Western Ry. Co.* (2)

[BLACKBURN, J. I do not see how those cases apply here.]

In *D'Arc* v. *London and North Western Ry. Co.* (3), "at owner's sole risk" was held not to relieve the carrier from liability for the consequence of their delay in the delivery; following *Robinson* v. *Great Western Ry. Co.* (4), *Phillips* v. *Clark* (5) is to the same effect. And so are *Ohrloff* v. *Briscall* (6), and *Czech* v. *General Steam Co.* (7) All these cases shew that, where a company are

(1) Law Rep. 8 Q. B. 57.
(2) Ante, p. 212.
(3) Law Rep. 9 C. P. 325.
(4) 35 L. J. (C.P.) 123.
(5) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.
(6) Law Rep. 1 P. C. 231.
(7) Law Rep. 3 C. P. 14.

primâ facie liable, as carriers or otherwise, for want of care, they cannot get rid of their liability for negligence except by the use of the clearest language possible.

Herschell, Q.C., in support of the rule. The original contract was complete and at an end on the arrival of the goods at their destination and the receipt by the plaintiffs of the notice to remove them. And a new contract was created by the notice on the plaintiffs leaving the goods after they were informed of the terms on which the defendants held them. The construction put by the plaintiffs on the notice gives no force whatever to the words, "at the owner's sole risk," for "not as carriers but as warehousemen" would leave the defendants liable for negligence or want of care. "At owner's sole risk," must therefore mean to relieve them from all liability, but with a right to claim rent for the space occupied in the storage of the goods. *McCawley* v. *Furness Ry. Co.* (1) is directly in point. The only thing a carrier of passengers is liable for is negligence, and "at passenger's sole risk" was therefore interpreted to absolve the carrier from all liability; so a warehouseman is only liable for negligence, that is, he must take reasonable care, and consequently "at owner's sole risk," must be interpreted to absolve the warehouseman from the only thing for which he would be liable.

[BLACKBURN, J., referred to *Cairns* v. *Robins.* (2)

FIELD, J., referred to *Great Northern Ry. Co.* v. *Swaffield.* (3)]

One of the plaintiffs came to the station in August and saw how the tow was stacked, and he must be taken to have acquiesced. The defendants wanted the tow to be removed, and it was left with them against their will; there is therefore nothing unreasonable in their saying, "We do not want the goods to remain, we would much rather get rid of them, and we will be liable for nothing. The goods remain, if they are not removed, at the owner's sole risk; but as we are forced to act as warehousemen, we shall charge rent for the space occupied." Secondly, the plaintiffs repudiated being owners, and they cannot afterwards turn round and as owners charge the defendants for damage suffered in the interval.

(1) Law Rep. 8 Q. B. 57. (2) 8 M. & W. 258.
(3) Law Rep. 9 Ex. 132.

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BLACKBURN, J. I think this rule should be discharged. I take it the law is very clear to this extent, that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. And after this notice, and the consignee does not fetch the goods away, and becomes in morâ, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee. There are several cases in which the question has been very much discussed as to when a carrier's liability ceases as an insurer, and his liability is changed into that of warehouseman. Such, for instance, as *Bourne* v. *Gatliffe* (1) and *Cairns* v. *Robins*. (2) In the first a fire had taken place after the goods had been put from on board defendant's ship on to a wharf, and the liability of the carrier was held still to continue. In the other, a similar case, there having been delay in the owner, the carrier was still held liable for the loss of the goods as bailee for reward. But I do not think there has been any case decided to this extent, that, because the owner of goods was idle and blameable for leaving them in the carrier's hands, therefore he as bailee held them under no responsibility whatever. I think in this case the railway company in holding these goods could have charged warehouse rent, and that being so, I think there can be no doubt that primâ facie there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care. And if the defendants in this case are under that liability, there is ample evidence that they did not do that. There is ample evidence on which a jury might find that they did not use ordinary care.

Mr. Herschell has taken two points, and I will deal with the second first. He says: The plaintiffs in the first instance said, "We will not have these goods because they do not fulfil our order; we are not the owners of them; we will not take them;

(1) 4 Bing. (N.C.) 314; 3 Man. & G. 643, in Ex. Ch.; 11 Cl. & F. 45, in H. L.
(2) 8 M. & W. 258.

you do not hold them for us, but for the consignors;" and then afterwards, when they find out that they were the owners of the goods, they said, "We do take them." And Mr. Herschell has argued that, having once said that, they cannot sue for injury to the goods between the time they said We are not the owners but the consignors, and the time they found out the mistake and said they would take them. I must say I cannot agree with that argument. The obligation of the railway company was what they themselves point out, namely, to hold them for the owner of the goods; and although the plaintiffs may have been mistaken in saying, "We are not the owners of the goods," yet when they found out they were, and took them, they were entitled to say, "During the time of keeping them, you were under an obligation to us, the owners of the goods, to take care of them; and you have neglected to do that, and it is we who have sustained the damage, and we now seek to recover it." That seems clear. It might have been that during the interval damage would occur to the goods necessarily from mere lapse of time, such, for instance, as a fall in price, or in the case of fruit which had become rotten, or articles that required to be brought very fresh, such as vegetables and fish, which in a very few days would become stale. I think in all these instances the damage would arise from the owner's fault; but this is not a case of that sort at all. These were goods which could be taken care of and remain safely at the station; but not being taken care of at all, but allowed to remain unprotected from the rain, they get drenched with rain, and suffer damage for the want of being taken care of, and not from the mere delay. Now, that being so, I take it the plaintiffs are entitled to say, "Whatever liability you incur, you incur to us."

Mr. Herschell says, secondly, that the defendants' liability was none at all, because, when the goods arrived, the defendants send this notice. [The learned judge read the notice.] Now, the plaintiffs' attention having been drawn to this notice, I think Mr. Herschell is right in saying that there is evidence that when one of the plaintiffs came to take away part of the goods, he, as the consignee, consented to the goods being held by the defendants, not as common carriers, but as warehousemen, at the owner's sole risk. What we have to consider is, whether the defendants can have

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the benefit of receiving warehouse rent without any liability whatever, for that is what Mr. Herschell's argument came to. We are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all. It is but reasonable to suppose that if the defendants meant to express any such thing as that, it should have been expressed clearly and distinctly. It is the company's own language, and must be taken as much as possible against them. I do not think that the words "at owner's sole risk," applied to such a case as this, mean that the company are to hold the goods, not as common carriers, but as warehousemen, and subject to warehouse charges, but that none of the liability of warehousemen is to be attached. I think that the words of that note mean to point out that they would hold them as warehousemen, and therefore they would be bound to take care of them; and at the owner's risk so far as this, that they did not hold as carriers with a liability (with the exception of lightning and one or two excepted perils) as absolute insurers.

In the case of *McCawley* v. *Furness Ry. Co.* (1) we had to consider, not the meaning of the terms of the contract, but the plea, and the plea gave us the legal effect of the contract. There a drover went gratis with cattle, on the terms that he was to go at his own risk (which was stated in the plea), and taking that as the legal effect of the contract, we thought, and thought quite rightly, that if any accident happened from the negligence of the servants of the company, the company were not responsible. This is a different contract, and it is one upon which I cannot put such a construction as that. On these grounds I think the rule should be discharged.

FIELD, J. I am of the same opinion upon both points. With reference to the principal point, it seems to stand thus:—The defendants were originally under a contract to carry these goods to Newchurch station, and I take it their duty was to do that which they did; and on the arrival of the goods at the station they gave the consignees notice of it, and then it became the consignees' duty to send for them within a reasonable time. During that

(1) Law Rep. 8 Q. B. 57.

reasonable time it might be a question whether the company held the goods as carriers or warehousemen. In order to prevent all doubt, the company adopted the usual course, that is, they gave notice to the consignees, "Your goods have come, you must send for them and fetch them away as soon as possible." And then they go on to say, "If you do not do that, we give you notice that we will no longer be liable as carriers, but we will hold them as warehousemen." Now, if the notice had stopped there, of course there would have been no question at all about it, because, even if the defendants were not bound to hold the goods, they did, in point of fact, hold and retain the goods as bailees, and they did, in point of fact, hold and retain them on the terms of their own notice; therefore the only question is as to what is the true construction of their own advice-note. Now undoubtedly the words "at owner's sole risk" do create a difficulty of construction. I must confess, for myself, that I do not at present see what element that expression provides for looking at the exact nature and character of the warehousemen's liability; but then I am bound to look at the whole contract, and read it altogether; and I find these words "at owner's sole risk" follow affirmative and positive words describing what the obligation is under which they came, and in what character they held the goods, viz., as warehousemen. They say, We will not hold them any longer as carriers, we will get rid of those risks by which carriers are very often harassed, but we will hold them under a known character and definition as warehousemen. I cannot hold, reading the words "at owner's sole risk" in connection with these other words, that that frees them from liability as warehousemen to take reasonable care of the goods, but only from the liabilities of carriers or insurers. I am therefore obliged to come to the conclusion that the defendants became liable as warehousemen, and in that respect they are liable. On the other point I agree with my learned Brother.

Rule discharged.

Attorneys for plaintiffs: *Milne, Riddle, & Mellor, for Hargreaves & Knowles, Newchurch.*

Attorneys for defendants: *Clarke, Woodcock, & Ryland, for Grundy & Co., Manchester.*

1875
May 11.

REED *v.* THE KILBURN CO-OPERATIVE SOCIETY.

Money lent for Six or Nine Months—Option in Borrower.

Plaintiff lent defendants 50*l.* under an agreement:—"Defendants agree to borrow from plaintiff the sum of 50*l.* at the rate of 6*l.* per annum, and plaintiff agrees to lend defendants the above sum for the term of nine or six months":—

Held, that the option of making it a loan for six or nine months was in the defendants, the borrowers.

DECLARATION for money lent.

Plea: never indebted. Issue joined.

At the trial before Cleasby, B., at the Surrey Summer Assizes, 1874, it appeared that the plaintiff had lent 50*l.* to the defendants in November, 1873, under the following agreement:—"Kilburn Co-operative Society, Limited. 19 Nov. 1873. We hereby agree to borrow from C. Reed the sum of 50*l.*, at the rate of 6*l.* per annum; and the said C. Reed agrees to lend the said society the above sum for the term of nine or six months" [signed by the officers of the company and by the plaintiff.]

After the six months had elapsed, but before the nine months had elapsed, the plaintiff demanded the money, and commenced the present action.

In answer to a question by the judge the jury found that the option was in the plaintiff; and the verdict was entered for the plaintiff, with leave to move to enter the verdict for the defendants, if the Court should be of opinion that on the above agreement the option was in the defendants.

A rule was obtained accordingly to enter the verdict for the defendants on the ground that the credit had not expired when the action was brought.

Pearce shewed cause. He contended that the option was in the plaintiff.

[BLACKBURN, J. Where it is not said at whose option one of two alternatives is to take place the rule of law is, that the option is in the party who is to do the first act; here the borrower is to do the first act by paying. *Price* v. *Nixon* (1) is directly in point.]

(1) 5 Taunt. 338.

There the lender had not, as here, exercised the option, but had let the six months pass.

[COCKBURN, C.J. It is clear the alternative is put in for the benefit of the borrower. The lender is master of the situation, and could impose any terms in the first instance.

QUAIN, J. A lease for seven, fourteen, or twenty-one years, without saying at whose option, is at the option of the lessee. (1)]

F. Turner and *F. H. Pain*, in support of the rule, were not called upon.

PER CURIAM (Cockburn, C.J., Blackburn, Mellor, and Quain, JJ.).

Rule absolute.

Attorneys for plaintiff: *Tilley & Liggins.*

Attorney for defendants: *W. H. B. Pain.*

HINDE *v.* LIDDELL AND OTHERS.

April 21.

Contract, Breach of, in Delivery of Goods—Measure of Damages.

The defendant contracted to supply to plaintiff 2000 pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October, defendant informed plaintiff that he would be unable to complete his contract by the time specified, on which plaintiff endeavoured to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his subvendee, procured 2000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the subvendee accepted, but paid no advance in price to plaintiff. The plaintiff sought to recover against defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. It was admitted at the trial that the shirtings which plaintiff bought were the nearest in price and quality that could be got by the 20th of October; and the jury returned a verdict for the amount claimed:—

Held, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price.

Borries v. *Hutchinson* (18 C. B. (N.S.) 445, 465), followed.

DECLARATION for not supplying certain grey shirtings according to contract.

(1) See *Dann* v. *Spurrier*, 3 B. & P. 399.

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HINDE v. LIDDELL.

Plea: payment of 25*l.* into court.

Replication, damages ultra. Issue joined.

At the trial before Field, J., at the last Manchester Spring Assizes, it appeared that the defendants agreed to supply the goods in question under the following order, which the plaintiff gave to them, at the same time informing them that the goods were for shipment:—

"Messrs. Liddell & Co. Manchester, Sept. 15, 1874.

"We note below particulars of contract made to day with you by us, and beg your attention to all the conditions of the same. We shall thank you to attend most particularly to delivery, as stated below . . . .

"2000 grey shirtings [giving the dimensions, &c.], price, 9*s.* 10½*d.*, delivery October 20th, certain.

"Yarns exactly like the pattern of No. 18 and 21 given us to-day.

"Heading to pattern herewith.

"(signed) pro Robert Hinde & Co.

"R. Rayner."

In order to supply this order the defendants had to get the goods manufactured according to a sample of shirting produced to and left with them for that purpose. They had placed the sample in the hands of a manufacturer for that purpose, but on the 15th of October they informed the plaintiff that they could not execute the order by the time specified. Upon this the plaintiff at once went into the market in search of goods of the same description and quality as those contracted for by the defendants, he, the plaintiff, being under contract with his vendee to ship the goods by first steamer in November. The plaintiff was unable to find goods of the same quality in stock, or to get them manufactured either at the same price or by the 20th of October, the time at which they were contracted to be delivered. He did, however, succeed in obtaining grey shirtings near the quality contracted for, although somewhat superior, and for that he had to pay an advanced price; and he purchased them and delivered them to his vendee in performance of his contract, but without obtaining any advance in price from him, or any advantage whatever from the superior quality of the goods. It was admitted by the defendants that the plaintiff used every reasonable effort to

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obtain cloth of the quality contracted for, and that the shirtings obtained were the nearest in quality and price that could be got in the market to be delivered by the 20th of October. The extra price over that contracted for with the defendants was 16½*d.* per piece, and amounted to the sum of 137*l.* 10*s.*, and it was to recover this sum that the action was brought.

There was no difference between the 15th of September and the 20th of October in the market price of yarns for the manufacture of goods of the description contracted for, and the 25*l.* paid into court was admitted to be sufficient to cover all damages, unless the plaintiff was entitled to recover the whole or part of the 137*l.* 10*s.*

The only fact in dispute was as to how much the goods bought by the plaintiff exceeded in value those contracted for.

This question was, by consent of the parties, the only one left to the jury, and they found that the shirtings bought by the plaintiff were 10½*d.* per piece better in quality than those contracted for by the defendants, which difference amounted to 87*l.* 10*s.*; and the defendants contended that, even if the plaintiff could recover any part of the increase in price, they were entitled to deduct 87*l.* 10*s.*, the plaintiff having obtained goods of a better quality to that extent.

The learned judge ruled that the plaintiff was entitled to recover the whole amount claimed, and directed a verdict for the plaintiff for 137*l.* 10*s.*, with leave to move to enter the verdict for the defendants, or to reduce the damages to the sum of 50*l.*

Jordan moved accordingly. The defendants had no notice of the plaintiff's sub-contract; he is therefore not entitled to any damages arising from the existence of this contract: *Williams* v. *Reynolds*. (1) The general measure of damages in such a case is the difference between the market price and the contract price. Here the price would have been the same in the market, as the price of the yarns had not changed.

[BLACKBURN, J. But there was no market for this particular description of shirtings, and therefore no market-price; in such a case the measure of damages is the value of the thing at the time of the breach of contract, and that must be the price of the

(1) 6 B. & S. 495; 34 L. J. (Q.B.) 221.

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best substitute procurable. *Borries* v. *Hutchinson* (1) is directly in point. How does this differ from the case of a carrier who fails to carry a passenger to a given place, in which case the passenger has been held over and over again to be entitled to take the best substitute in the shape of a conveyance he can get, no matter that it costs much more than the fare?]

The measure of damages is different in the case of a carrier and a contract to supply goods.

[BLACKBURN, J. Not so. The carrier contracts to supply the conveyance, and fails by not carrying his passenger.]

Secondly, the defendants are, at all events, entitled to reduce the verdict by 87*l.* 10*s.*, the excess in quality of the shirtings the plaintiff obtained over those which the defendants contracted to supply. It has been held that a plaintiff is not entitled to make a profit out of a defendant's breach of contract; and here the plaintiff might have re-sold the next day at an advance of price.

[FIELD, J. The plaintiff bought the shirtings to enable him to fulfil his contract, and he got no advance in price from his vendee.]

COCKBURN, C.J. I am of opinion that there should be no rule. The question is whether, when one person orders and another undertakes to supply goods which are not to be had ready-made in the market, but have to be first manufactured, the latter may break his contract at the risk of having to pay nominal damages only, or whether he must pay such damages as usually arise in the course of mercantile transactions of the kind, where he neglects to fulfil his contract on the given day. Here the defendants inform the plaintiff that they will be unable to supply and deliver the shirtings; the plaintiff immediately goes over Manchester and tries, but cannot get shirtings like those he ordered, but he gets the nearest to them that he can, and so avoids what would otherwise have been the consequence of his not fulfilling his contract of shipment. In so doing he incurs a loss by having to pay a larger price with no advance from his vendee. The course the plaintiff pursued was right and reasonable; he would have had to pay larger damages had he not fulfilled his contract, and so by giving this advance of price he did what was the best for all parties. He is, therefore entitled to the damages he claimed.

(1) 18 C. B. (N.S.) 445, 465; 34 L. J. (C.P.) 169.

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BLACKBURN, J. I am of the same opinion. This was a contract by which the defendants undertook to get manufactured and deliver a quantity of shirtings on a certain day; they did not fulfil the contract, and the general measure of damages in such a case would be the value of the thing on the day when the contract ought to have been fulfilled, and in general the market price gives this value; but when the thing cannot be got in the market, but must be previously ordered and manufactured, if you cannot have the market price, still the plaintiff is entitled to more than nominal damages. In *Elbinger Actien-Gesellschafft* v. *Armstrong* (1), which was an action for not delivering castings according to tracings which could not be got ready-made, it is said in the judgment of the Court: "It is no doubt quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be very unjust if, in such cases, the damages must be nominal: and there are several decisions shewing that such is not the law. In *Bridge* v. *Wain* (2), where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings, Lord Ellenborough ruled that the plaintiffs were entitled to the value of scarlet cuttings in China. In *Borries* v. *Hutchinson* (3), where the action was to recover damages for delay in delivering caustic soda, which it was admitted was an article which is not kept in stock, so as to be capable of being at any time bought in the market, and, consequently, there was no ascertainable market price; Willes, J., in that case, says: 'In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for a breach of contract to deliver is the difference between the contract price and the market price on the day of the breach. . . . There was no market price to which resort could be had as a test of damage. We must, therefore, ascertain what was the value of the article contracted for at the time when it ought to have been and at the time when it actually was delivered.'" In the present case,

(1) Law Rep. 9 Q. B. 473, 476.
(2) 1 Stark. 504.
(3) 18 C. B. (N.S.) 445, 465; 34 L. J. (C.P.) 169.

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the goods were for a foreign market; and it was admitted that the only reasonable thing the plaintiff could do was to put himself in the same position as if the defendants had fulfilled their contract by obtaining a somewhat dearer article. I do not see on what principle it can be said that the plaintiff is not entitled to recover this difference in price. We do not decide anything as to what the effect of a notice of the plaintiff's sub-contract might have been. Under the circumstances, the value of the goods contracted to be supplied by the defendants at the time of their breach of contract was the price the plaintiff had to give for the substituted article.

MELLOR, J. I am of the same opinion, and do not wish to add anything to what has been said by the other members of the Court.

FIELD, J. I am of the same opinion. The jury gave a verdict for 137*l.* 10*s.*, the difference between the contract price and the price the plaintiff had to give for other shirtings. As soon as the defendants told the plaintiff that they could not complete their contract, the plaintiff did the best he could to find cloth of the same description; he was unable to do so, but he did find a number of pieces of another kind, which was the nearest in price and quality to be got. The plaintiff bonâ fide paid the increased price which he did not and could not have recovered from his vendee. It follows that he was entitled to recover this difference in price as the damages which were the natural consequence of the defendants' breach of contract, and were what must have been in the contemplation of the parties when they made the contract. It is to be observed, that the defendants were told that the shirtings were for shipment; and even without this, the description of the article was such as made it known that it was not for wear in this country, but for export to a foreign market. The defendants not supplying the cloth at the given day, the plaintiff was entitled to get the best substitute he could. If he had derived any benefit from the advance in price, I should hesitate before I said he could recover the whole of the difference; but he derived no benefit whatever beyond being able to complete his contract with his vendee on the original terms upon which he had contracted.

Rule refused.

Attorney for defendants: *W. H. S. Watts, Manchester.*

ROBSON *v.* THE NORTH EASTERN RAILWAY COMPANY.

1875
May 8.

Railway Company—Duty to Passenger on alighting from Train—Substitute for Platform—Negligence.

Where a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting.

Plaintiff, a female, was a passenger by defendants' railway to B., a very small station; on the arrival of the train at the station, the engine and part of the carriage in which plaintiff was riding, were driven past the end of the platform which is short, and came to a standstill; the door of the plaintiff's compartment being beyond the end of the platform. Upon the train stopping, plaintiff rose and opened the door, and stepped on to the iron step; she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavouring to get the other foot on to the footboard she lost her hold of the carriage-door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff:—

Held, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform.

Held, secondly, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff.

DECLARATION for negligence in carrying the plaintiff as a passenger by defendants' railway.

Plea, not guilty. Issue joined.

At the trial before Archibald, J., at the Northumberland

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summer assizes, 1874, a nonsuit was directed, with leave to the plaintiff to move to enter a verdict for 100*l.*, if the Court should think there was evidence of negligence for the jury. The facts are fully stated in the judgment.

A rule having been obtained, pursuant to the leave reserved,

April 22. *Herschell, Q.C.*, and *Crompton*, shewed cause.

Kay, Q.C., in support of the rule.

The following cases were cited: *Bridges* v. *North London Ry. Co.* (1); *Siner* v. *Great Western Ry. Co.* (2); *Foy* v. *London, Brighton, and South Coast Ry. Co.* (3); *Cockle* v. *London and South Eastern Ry. Co.* (4); *Praeger* v. *Bristol and Exeter Ry. Co.* (5)

Cur. adv. vult.

May 8. The judgment of the Court (Blackburn and Field, JJ.), was delivered by

FIELD, J. This is an action brought to recover damages sustained by the plaintiff for personal injury caused, as she alleges, by the negligence of the defendants, who deny their liability.

The cause was tried before Archibald, J., at the Newcastle summer assizes, 1874, who held that there was no evidence of negligence, and directed a nonsuit, with leave to the plaintiff to move to enter a verdict for 100*l.*, "if the Court should think that there was evidence of negligence;" and the rule in question was granted in pursuance of that leave.

The facts proved were that the plaintiff was a passenger by the defendants' railway to a small station called "Benton," and that on the arrival of the train at that station, the engine and the part of the carriage in which the plaintiff was riding were driven past the end of the platform, and came to a standstill, the door of the plaintiff's compartment being beyond the end of the platform. It appeared that upon the train stopping the plaintiff rose, and opened the door, and stepped on to the iron step; that she looked to see whether there were any railway servants about, and saw the

(1) Law Rep. 6 Q. B. at p. 394; 7 H. L. 213.

(2) Law Rep. 3 Ex. 150; 4 Ex. 117, in Ex. Ch.

(3) 18 C. B. (N.S.) 225.

(4) Law Rep. 7 C. P. 321.

(5) Law Rep. 7 C. P. at pp. 323-324.

station-master taking luggage out of or putting luggage into the van, but she did not see the guard or any other railway servant, and she stood on the step looking for somebody to help her, until she became afraid of the train moving away, and no one then coming she tried to alight by getting on to the footboard, and in so trying, slipped her foot and fell down by the carriage side, and thus sustained the injury for which the action was brought. At the time she was trying to get on to the footboard she had her back to the carriage. She had hold of the door with her right hand, and had got one foot on to the footboard, and it was whilst endeavouring to get the other foot on to the footboard that she lost her hold of the carriage-door, and slipped, and fell, she having at the time upon her left arm a small bag, and in her left hand a small empty basket, small quart case, and umbrella, but nothing in her right hand.

The station in question is a very small one, and the platform short, and the station-master is the only servant kept there.

The only question we have to deal with is, whether there was any evidence here upon which the jury, as men of ordinary reason and fairness, might properly come to the conclusion that the defendants were guilty of an act or acts of negligence which caused the accident. Now we think that the mere overshooting the platform is not such evidence: *Cockle* v. *London and South Eastern Ry. Co.* (1); *Lewis* v. *London, Chatham, and Dover Ry. Co.* (2); and *Weller* v. *London, Brighton, and South Coast Ry. Co.* (3); but, in the present case, the train not merely overshot the platform, but the facts were such as to afford at least evidence that it had been brought to its final standstill, and that there was no indication of any intention existing in fact or evinced to back it, and no warning or intimation to any of the passengers (including those who were beyond the platform) not to get out; and we think that, upon this evidence, on the authority of the cases above referred to, if it needed authority, there was abundant evidence upon which the jury might reasonably have come to the conclusion that the plaintiff had arrived at the spot at which it was intended she should alight, and that she was by the acts of the defendants' servants impliedly invited so to do, or

(1) Law Rep. 7 C. P. 321, 324. (2) Law Rep. 9 Q. B. 66.
(3) Law Rep. 9 C. P. 126, 132, 134.

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at least that the conduct of the defendants' servants was such as would induce a reasonable person in the plaintiff's circumstances to believe, and did in fact induce her to believe, that she was invited to alight there; which we think would amount to the same thing. The plaintiff, therefore, having been invited to alight at a spot at which the ordinary and usual means of descent were absent, we think that the duty of the defendants not to expose the passenger to undue danger required them to provide some reasonably fit and safe substitute: *Gee* v. *Metropolitan Ry. Co.* (1); and the question for our consideration is whether a jury might not reasonably have come to the conclusion that the company failed in the performance of that duty as regards the plaintiff. Now the only means provided were the iron step and the footboard, and although a man using ordinary care might perhaps have safely adopted those means of descent, the jury might have thought that the same measure of reasonable means hardly applies to the case of a woman. Her mode of life, dress, and habits render her ill adapted to grapple with difficulties of the character involved in this question; and if the jury had found that the means adopted were in this respect not such as ordinary and reasonable care required in reference to the plaintiff, we think it could hardly be contended that the Court would be bound to send the case back for a new trial: *Foy* v. *London, Brighton, and South Coast Ry. Co.* (2)

It was, however, argued that the injury here was the result not of any want of care on the part of the defendants, but was caused by the voluntary act of the plaintiff herself in endeavouring to alight of her own will and with her eyes open. But it has been long established that, if a person by a negligent breach of duty expose the person towards whom the duty is contracted to obvious peril, the act of the latter in endeavouring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrongdoer: *Jones* v. *Boyce* (3); and this doctrine has, we think, been rightly extended in more recent times to a "grave inconvenience," when the danger to which the passenger is exposed is not in itself

(1) Law Rep. 8 Q. B. 161. (2) 18 C. B. (N.S.) 225.
(3) 1 Stark. 493.

obvious. In *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1), the doctrine was accurately expressed by Brett, J., who says: "If the inconvenience is so great that it is reasonable to get rid of it by an act, not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." And although the decision in that case has been questioned, the rule laid down by Brett, J., was approved of in *Gee* v. *Metropolitan Ry. Co.* (2), and is one in which we entirely concur. In the present case, a jury might not improperly have found that the expectation of being carried beyond the Benton station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to what did not probably present itself to her as any obvious danger, viz. endeavouring to alight by means of the step and footboard. We do not say that the jury might not, on this evidence, have found that the plaintiff herself, by negligence on her part, so far contributed to the result as that, but for her negligence, it would not have come about; but we certainly, in the present case, cannot say that there was any such conclusive evidence that the injury was brought about or materially conduced to by any act of negligence of the plaintiff, as to have rendered it the duty of the judge to have withdrawn the case from them.

The rule, therefore, will be made absolute to enter the verdict for the plaintiff for 100*l.*

Rule absolute.

Attorneys for plaintiff: *Brownlows.*

Attorneys for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

(1) Law Rep. 4 C. P. at p. 744. (2) Law Rep. 8 Q. B. at p. 173.

1875
May 4.

BULLOCK AND OTHERS *v.* CAIRD.

Action against one of several Joint Contractors—Foreign Law—Lex loci fori—Procedure.

1 L. D. 168

To an action against a single defendant, for a breach of an agreement to build a vessel entered into between the plaintiffs and C. & Co., the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of C. & Co., and that the agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English Courts and within the jurisdiction of the Scotch Courts; and by the law of Scotland the firm was and is a distinct person from any or the whole of the individual members of whom it consists and of whom the defendant is one; and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by the name of C. & Co.; that the agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreement the firm consisted of certain individual members, who are all domiciled in Scotland; and that by the law of Scotland the defendant was, as a partner in C. & Co. in the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners jointly for any breaches of the agreement, and it is a condition precedent to any individual liability attaching to the defendant as an individual member of the firm in respect of the agreement that the firm, as such person, or the whole individual partners jointly, should first have been sued and that judgment should have been recovered against the firm or the whole of the partners jointly, and that the plaintiffs have not sued the firm of C. & Co. nor the whole of the partners jointly, nor recovered judgment against it or them:—

Held, on demurrer, that the matters stated in the plea were matters of procedure, and that the plea was therefore bad.

ACTION by the plaintiffs against the defendant for the breach of an agreement to build a ship.

The material part of the agreement, which was set out in the declaration, was as follows:—

"Glasgow, July 15th, 1874. Messrs. Caird & Co., shipbuilders, Greenock, agree to build for Messrs. James and George Bullock & Co., London, who agree to accept an iron sailing ship of the following dimensions, &c." Throughout the agreement the parties were mentioned as Caird & Co. and Bullock & Co.

Plea, that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of Caird & Co.,

and the alleged agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English Courts and within the jurisdiction of the Scotch Courts, and by the law of Scotland the firm was and is a separate and distinct person from any or the whole of the individual members of whom it consists and of whom the defendant was and is one, and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligation of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by its name of Caird & Co., and the alleged agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreements the firm consisted of certain individuals, namely, the defendant James Tennant Caird and Patrick Tennant Caird, and has always since consisted and still consists of the same members, and the firm and each of its individual members then was and always since has been and still is domiciled and carrying on business in Scotland, and within and subject to the jurisdiction of the Scotch Courts and possessed of sufficient property and funds, within and subject to the jurisdiction to answer in full the claim of the plaintiffs; that by the law of Scotland the defendant became and was, as a partner of the firm of Caird and Co., on the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners thereof jointly for any breaches of the agreement; and save as aforesaid no liability by the law of Scotland attached or attaches to the defendant in respect of the agreement; that by the law of Scotland it is a condition precedent to any individual liability attaching to the defendant or any individual members of the firm in respect of the agreements that the firm as such person as aforesaid or the whole individual partners thereof jointly should first have been sued, and that judgment should have been recovered against the firm or the whole of the said partners jointly, and that the plaintiffs have not sued the firm of Caird & Co. nor the whole of the partners jointly, nor recovered judgment against it or them.

Demurrer to the plea and joinder.

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Cohen, Q.C. (*J. C. Mathew* with him), in support of the demurrer. The plea is bad. It does not allege that Caird & Co. are a corporation, or that the plaintiff could sue Caird & Co. in this country by its name of Caird & Co., it merely alleges that by the law of Scotland it is a condition precedent that the firm, or all the members of the firm, should be sued before any liability can attach to an individual member of the firm. The plea, therefore, merely states the form of procedure in Scotland: but the forms of remedies and modes of proceeding are regulated solely by the lex fori; in this case by the law of England. It is no objection to a suit instituted in proper form here that it would have been instituted in a different form in the court of the country where one of the joint contractors resides, or where the contract was made: *General Steam Navigation Co.* v. *Guillou* (1); *Mostyn* v. *Fabrigas.* (2) [He was then stopped.]

W. Williams, Q.C. (*English Harrison* with him), contrà. The plea is good. It alleges that the defendant is domiciled in Scotland; that the contract was made in Scotland, and is governed by Scotch law; and that by the law of Scotland the defendant's liability can only arise after judgment has been obtained against the firm or all the members of the firm. It is like suing a corporation, and, after judgment is obtained, making the individual members parties to the action by a writ of scire facias, and then issuing execution against them. The plea is a good plea in bar.

Cohen, Q.C., was not heard in reply.

BLACKBURN, J. It is quite clear that the firm of Caird & Co. are not a body corporate. The plea alleges that the firm, or the whole individual partners thereof jointly, should first have been sued. If one of the members of the firm was not joined it might be a bar to an action in Scotland, but it could only be pleaded in abatement in an action in England. I think all the matters stated in the plea are mere matter of procedure, and that the plea is bad.

MELLOR and FIELD, JJ., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Hollams, Son, & Coward.*
Attorneys for defendant: *Freshfields & Williams.*

(1) 11 M. & W. 877. (2) 1 Sm. L. C. at p. 623, 6th Ed.

BALDWIN, APPELLANT; WHITE, RESPONDENT. 1875 *April* 21.

Municipal Corporation—5 & 6 Wm. 4, c. 76, s. 84—Buildings used as Watch-houses to be given up for Use and Accommodation of Constables.

By s. 84 of 5 & 6 Wm. 4, c. 76, as soon as constables shall have been appointed by the watch committee of any borough, a notice signed by the mayor, specifying the day on which such constables shall begin to act, shall be fixed on the door of the town hall . . . . and on the day so specified in such notice, so much of all Acts named in conjunction with such borough in the schedule E to this Act annexed, and of all Acts made before the passing of this Act as relates to the appointment, regulation, powers, duties, or to the assessment or collection of any rate to provide for the expenses of any watchmen, &c. . . . . for any place situate within such borough shall cease, . . . and all watchhouses in any such place shall be given up to such persons as shall be named by the mayor, . . . and where there shall be any building in any such place as aforesaid, a part only of which building shall have been heretofore used as a watch-house, such part shall be given up every day from the hour of four in the afternoon until the hour of nine in the forenoon for the use and accommodation of the constables to be appointed under this Act . . . .:—

Held, that the above section applied only to buildings used as watch-houses in places under the control of local authorities before the passing of the Act.

CASE stated by the stipendiary magistrate of the borough of Brighton under 20 & 21 Vict. c. 43.

The appellant was charged under a summons, for that he, at Preston, in the borough of Brighton, on the 5th of January, 1874, being the person having the charge, control, and possession of a building, part whereof had been theretofore used as a watchhouse, to wit, the police office and cells, did refuse to give up such part thereof from the hour of four in the afternoon until the hour of nine in the forenoon for the use and accommodation of the constables appointed for the borough under 5 & 6 Wm. 4, c. 76, s. 84, and was convicted of the offence charged, and sentenced to pay a fine of 1*l.* and costs, or in default of payment to be imprisoned seven days.

A charter of incorporation was, on the 1st of April, 1854, granted to the borough of Brighton, declared to be co-extensive with the parish of Brighton, and constables were thereupon, and have been since, appointed by the watch committee for the borough, according to the provisions of 5 & 6 Wm. 4, c. 76.

By a local Act, "The Brighton Borough Extension Act, 1873,"

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which received the royal assent on the 7th of July, 1873, it was enacted that and from and after the 31st of October, 1873, the borough should extend to and include part of the parish of Preston, in the county of Sussex (which parish adjoins Brighton parish), in such Act referred to as East Preston.

In East Preston there existed at the passing of the Brighton Borough Extension Act, 1873, and at the date when the offence for which the appellant was summoned was alleged to have been committed, a station of the East Sussex county constabulary. This station consisted of a residence for the superintendent of a district of the county comprising other parishes besides Preston, and for two other constables with families, or five single constables, a police office, and cells, and other buildings.

This station and buildings were provided, about three years before the passing of the Local Act of 1873, by the justices of East Sussex in quarter sessions, under the powers of 3 & 4 Vict. c. 88, and other Acts relating to county police. The cost of this and of other police stations, provided for the county from time to time, was raised at interest by charges on the county police rates; the principal being repayable by twenty annual instalments, of which some have been paid off and some remain unpaid.

The appellant was the superintendent of the county constabulary, residing at and having charge of the station at East Preston at the time when the offence was alleged to have been committed.

On the 3rd of November, 1873, the mayor, under s. 84 of 5 & 6 Wm. 4, c. 76, issued a notice stating that constables had been appointed to act, and that they would begin to act for the extended borough on the 8th of November following, and that he had appointed George White, the chief constable of the borough, the person to whom "all watch-houses and watch-boxes within the extended borough, and all arms, accoutrements, and other necessaries provided at the public expense for any watchmen, constables, patrol, and police therein shall be given up for the use and accommodation of the constables so appointed as aforesaid." There had been no appointment of any constables by the watch committee of the borough between the time of the Brighton Borough Extension Act coming into operation (1st of November, 1873) and the issuing of the notice; but there was, on the 1st of Novem-

ber, 1873, an efficient body of police who had been appointed by the watch committee previously to the 1st of November, 1873, constables of the borough as it then existed, and by whom the watching of the extended borough was after the 1st of November, 1873, conducted.

On the 5th of January, 1874, the day on which the offence is charged, the respondent, who was chief officer of the Brighton borough police, went, after the hour of four in the afternoon, to the station at East Preston and saw the appellant, and demanded of him possession of such part of the station as had been heretofore used as a watch-house. The appellant refused to give possession.

The magistrate was of opinion that such part of the station as had been used as a police office and cells constituted a watch-house within the meaning of 5 & 6 Wm. 4, c. 76, s. 84, and that s. 84 applied to such part of the station, and that possession of such part of the station ought, on demand by the respondent, to have been given up by the appellant.

The question for the opinion of the Court was whether the judgment of the magistrate was correct.

Merrifield (*Lumley Smith* with him), for the appellant. The magistrate has arrived at an erroneous decision; the council of the borough of Brighton are not entitled to have the watch-houses and buildings, which are the property of the county of Sussex, delivered up to them for the use of the borough police. When the Municipal Corporation Act (5 & 6 Wm. 4, c. 76) was passed, there were many local authorities who exercised jurisdiction under local Acts of Parliament within towns and boroughs: such as trustees of paving, lighting, and watching. On these towns and boroughs being incorporated, it was necessary that these local jurisdictions should cease; and by a group of sections, of which s. 84 is one, the powers exercised under these local Acts, and the property held by these local authorities, were transferred to the mayor and corporation of boroughs. This was effected by ss. 75, 76, and 77, and then comes s. 84, which provides that a notice of the appointment of constables by the watch committee, specifying the day on which the constables shall begin to act, shall be affixed to

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the door of the town-hall and of every church within the borough: and on the day so specified "so much of all Acts named in conjunction with such borough in the schedule E, and all Acts made before the passing of this Act as relates to the appointment, regulation, powers, and duties, or to the assessment or collection of any rates, to provide for the expenses of any watchmen, constables, &c., for any place situate within the borough shall cease and determine;" and all watch-houses, &c., in any such place, and all arms, &c., shall be given up to such persons as shall be named by the mayor. . . . and all property so to be given up shall be deemed to belong to the body corporate of such borough. . . . And where there shall be any building in any such place, a part of which building shall have been heretofore used as a watch-house, such part shall be given up every day from the hour of four in the afternoon until the hour of nine in the forenoon for the use and accommodation of the constables so appointed under this Act." . . . Sect. 84 therefore applies only to a state of things which existed before it passed. The county police were not at that time established, and s. 84 can have no application to watch-houses built and paid for out of county rates raised under 3 & 4 Vict. c. 88, an Act passed subsequently to 5 & 6 Wm. 4, c. 76. [He was then stopped.]

Manisty, Q.C. (*Finlay* with him), for the respondent. The council of the borough of Brighton are entitled to the use of the watch-house situate at East Preston. The county of Sussex has, now that the limits of the borough are extended, a portion of the county watched over by the borough police; and, further, by s. 76, the borough police have jurisdiction, not only over the borough, but within the county, being within seven miles of the borough, and for this purpose it is necessary that the borough police should have the use of the county watch-house, and it is given to them under s. 84.

Merrifield was not heard in reply.

BLACKBURN, J. I am of opinion that the first part of s. 84 controls the latter part. The watch-house in question was erected after the passing of 5 & 6 Wm. 4, c. 76, and s. 84 has no application to the present case.

LUSH, J. Section 84 only applies to watch-houses under the control of the local authorities before the passing of 5 & 6 Wm. 4, c. 76.

QUAIN and FIELD, JJ., concurred.

Judgment for the appellant.

Attorneys for appellant: *Burton, Yeates, & Hart.*
Attorneys for respondent: *Tilleard & Co.*

THE QUEEN, ON THE PROSECUTION OF JOHN WALLWORK, APPELLANT, *v.* THE OVERSEERS OF THE TOWNSHIP OF WEST DERBY, RESPONDENTS.

April 28.

Poor-rate—Rateability of Premises occupied as a Certified Industrial School under 29 & 30 *Vict. c.* 118.

Premises, occupied as a school, the managers of which have received a certificate under 29 & 30 Vict. c. 118, s. 7, constituting it a "certified industrial school," are liable to be rated to the poor rate.

ON an appeal to the Lancashire quarter sessions against a poor-rate for the township of West Derby, in which the appellant was rated as the occupier of certain lands and tenements, the sessions quashed the rating, subject to a case.

1. The premises in respect of which the rate was made consisted of a large house and garden covering about half a statute acre. They were leased at an annual rental to the appellant, who is a canon of the Roman Catholic church, and it was admitted on his behalf that if the premises were liable to be rated, the appellant was the proper person to pay the rates.

2. Except as hereinafter appears, the premises were used as an industrial school for lodging, clothing, feeding, teaching and training female children sent there from all parts of the country, by orders of the magistrates, under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118). The appellant, assisted by a committee of gentlemen, superintended the management of the school, but neither he nor any of the committee resided on the premises.

3. The school was under the supervision of a matron, who, with

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some assistants and servants, lived in the house; one of the servants received wages, but the others gave their services in exchange for board and lodging. The matron received no payment, nor did the appellant or any of the committee of management.

4. In the year 1867, upon the application of the appellant's predecessor in the office of manager, the secretary of state had certified that the school was fit for the reception of children to be sent there under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118). Up to the date of this appeal the certificate so granted had not been withdrawn or resigned.

5. Prior to the making of the rate, on the 9th of July, 1873, the appellant had at different times received children who had been merely privately recommended to him as fit objects for the school, but the last of these was discharged before the making of the rate; since which time he had refused to receive any children unless they were sent under an order of a justice granted in pursuance of the Act of Parliament; and now if a child is recommended to him for admission he directs her to be taken before a justice in order that such order may be obtained before he receives her into the school.

6. At the date of the hearing of this appeal all the children, about 140 in number, were detained under such orders.

7. The commissioners of Her Majesty's treasury, acting under s. 35 of 29 & 30 Vict. c. 118, contribute certain sums towards the custody and maintenance of such children as may be detained in the school in pursuance of the Act. The money thus obtained, about 1200*l.*, defrays the greater portion of the expense of supporting the school, the remainder being provided for by charitable donations of private persons and by such small profit as may accrue from the work of the children.

8. Regular monthly, quarterly, and annual returns to the home secretary in the forms ordered by him, of the numbers, ages and dates of commitment of the children detained, in pursuance of orders of magistrates, are duly made by the appellant, and the orders of commitment themselves are also sent to the home secretary as soon as received by the appellant.

It was contended on behalf of the respondents, upon the facts as stated, that the premises were used as a private charitable institu-

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tion, and were therefore rateable for the relief of the poor; and further, that, though they might come within the meaning of 29 & 30 Vict. c. 118, as a certified industrial school, they would not thereby be exempted from liability to be rated. The sessions considered that the school was a "certified industrial school" within the meaning of the Act, and was therefore exempt from liability to be rated to the relief of the poor.

The question for the opinion of the Court is, are the premises liable to be rated for the relief of the poor?

C. Russell, Q.C., and *Lewis Williams*, for the appellant. A certified industrial school is not liable to be rated to the relief of the poor. The case is within the exemption to the rule laid down in the *Mersey Dock Case*. (1) The exemption still extends to the sovereign, because he is not named in the statute 43 Eliz. c. 2, to buildings in the occupation of the servants of the crown, and to buildings occupied for public purposes, that is, for the use and service of the government of the country. This industrial school is occupied for public purposes; it is as much occupied for such purposes as a gaol; its constitution, its government, the mode in which it is supported, partly by voluntary contributions and partly by government aid, make it analogous to a reformatory school, established under 17 & 18 Vict. c. 86; and it has been held in *Sheppard* v. *Bradford* (2) that a certified reformatory school is not liable to be rated. That case was decided before the *Mersey Dock Case* (1), but the reasons given in the judgment of Erle, C.J., shewing that such a building is not rateable, are still valid, and apply to the present case.

[BLACKBURN, J. In *Reg.* v. *Temple* (3), an institution, founded for educational purposes and supported partly by private and partly by public funds, was held to be rateable.]

There is a distinction between an institution founded for educational purposes and a certified industrial school. The managers of the latter have a power delegated to them from the government to detain juvenile offenders, and they are detained there against their will or the will of their parents; the managers are,

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. N.S. 746

(2) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182. 10 Jur. N.S. 799.

(3) 2 E. & B. 160; 22 L. J. (M.C.) 129. 17 Jur. 572

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in a sense, the servants of the crown, and the building is occupied for government purposes, that is, for the reformation of juvenile offenders, who, but for their detention at the school, would be confined in gaol. This school is made a certified industrial school by 29 & 30 Vict. c. 118, s. 7. By s. 10, it is subject to inspection by the inspector of industrial schools; s. 12 empowers a prison authority to contribute towards the rebuilding a certified industrial school or towards its support, or towards the establishment of a school intended to be a certified industrial school; ss. 15 & 18 authorize a magistrate to order children under the age of twelve years, charged with offences punishable by imprisonment, to be sent to such schools, if the managers are willing to receive them, and the school selected is to be one conducted in accordance with the religious persuasion to which the child belongs. By s. 29, the rules for the management of the school must be approved of by the secretary of state; by s. 33, it is an offence for a child to escape from the school; by s. 35, the Treasury may contribute towards the maintenance of children detained in certified industrial schools; and by s. 204, the secretary of state may withdraw the certificate of the school, and the school shall then no longer be deemed to be a certified industrial school. These schools, though managed by private individuals, are under the supervision of the government. The statute 35 & 36 Vict. c. 21, s. 7, empowers a prison authority itself to establish industrial schools like the school in question. A school so established would, undoubtedly, be a school established for public purposes, and would not be rateable; and, if this be so, it is difficult to see why a school established under 29 & 30 Vict. c. 118, and which carries out the same objects, and is conducted on the same principle, should be rateable. These schools are established for purposes connected with the government of the country, and they are recognized as institutions of great public utility, and are supported partly by public funds; they fall within the exemption laid down in the *Mersey Dock Case* (1) and acted upon in *Reg.* v. *St. Martin, Leicester* (2), and *Reg* v. *University of Edinburgh* (3), and are not liable to be rated.

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. (2) Law Rep. 2 Q. B. 493.
(3) Law Rep. 1 H. L., Sc. 348.

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Herschell, Q.C., and *Cleaver*, for the respondents. A certified industrial school is rateable to the relief of the poor; it cannot be said, either in a strict sense or extended sense, to be a building occupied by the servants of the crown for the purposes of the government of the country. It is a private charity, supported partly by voluntary contributions and partly by government help. The children received at the school are not all of a criminal class. By s. 14 of 29 & 30 Vict. c. 118, children found begging, not having any home, found destitute, either being orphans, or having a surviving parent who is undergoing penal servitude, or children who frequent the company of reputed thieves, may, by a magistrate's order, be sent to a certified industrial school; nor are the managers bound to receive the children so sent; by s. 18, children can only be sent to schools the managers of which are willing to receive them. The payments made by the Treasury only go to the relief of the charity. Take the case of a national school: the government contribute to its support out of the public funds, but that does not exempt it from liability to be rated to the relief of the poor. Under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), school boards have power to establish reformatory schools and industrial schools. The school board schools are rateable, but it would be a strange anomaly to hold that the reformatory and industrial schools which they establish are not rateable. The managers of industrial schools are not the servants of the Crown, they are not under the entire control of the Crown; they cannot be dismissed by the Crown: *Sheppard* v. *Bradford* (1) is overruled by the *Mersey Dock Case.* (2) [They were then stopped.]

BLACKBURN, J. I am of opinion that upon the facts stated the appellant is rateable. He is the person who is the manager of a charitable institution, in connection with which there is a school into which the managers receive what may be called "street Arabs," to educate and to have them taught proper trades, provided they are of the Roman Catholic religion, or can be brought up in that religion. Such schools are by no means peculiar to the Roman Catholic religion, but exist in various other persuasions.

(1) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182. 10 Jur N.S. 799 (2) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur N.S. 746

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That being the state of things, Parliament, by the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), said, in effect, this: "If persons who have industrial schools will obtain a certificate, to secure which they must shew it is a good school and well managed, we, the government, will authorize justices to send to any industrial school in whatever parish, children whom, if the managers of the school receive them, which they are not bound to do, they may maintain and educate as objects of charity, and we, the government, will pay a certain sum towards the expenses." That is, in effect, the scheme of the Act, and there is a further provision that in selecting the school the justices will, as far as practicable, send the children to a school where the religion taught is the same religion as that professed by the parents. That being so, children are sent in large numbers to the appellant's school, the school being a certified industrial school. It appears in the case that recently the committee have ceased to take any but those sent by justices. Now the contention is that the property, which was occupied by the appellant as a private charity, has come to be occupied by him as a servant of the government, so as to make the property not rateable. But I am of opinion that the appellant does not so occupy. Before the decision of the *Mersey Dock Case* (1), an idea had got about that if the occupation were for public purposes or charitable purposes that prevented the occupation being beneficial, and that persons were not rateable who occupied buildings for public purposes or for charitable purposes. But in the *Mersey Dock Case* (1), which so far as it went settled the law, it was decided that the fact of it being an occupation for public purposes did not exempt the occupier from the payment of poor-rates, but that the occupier was rateable provided he derived revenue from the land, unless the occupation was on behalf of the Crown—or what may be called an extension of the privilege of the Crown—an occupation for the purposes of the government of the country. I do not think I can state the decision of the House of Lords better than by reading the concluding words of Lord Cranworth's judgment. After having stated that he agreed with the Lord Chancellor, he says: "To avoid all misconception I wish to add that there are certain cases to which the observations I have

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur N.S. 746

made do not apply. The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses, occupied by the Crown, or by servants of the Crown, or for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates not only royal palaces, but also the offices of the secretaries of state, the Horse Guards, the Post Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the judges have been held exempt. These decisions however have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by the servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country." We were much pressed with *Sheppard* v. *Bradford.* (1) I think if that decision had rested on the ground that the occupier of a reformatory school had been a servant of the government it would have been a question (though I should have differed from the conclusion of fact) whether we could overrule that case. But I think, when we look at the reasons given, the decision rests on the ground that the occupation was for a public purpose. I think, therefore, that case was within the principle overruled by the *Mersey Dock Case* (2), and does not come within the exemption. Now what we have to see here is this: Is the occupation of the appellant, the manager of an industrial school for the education of children, changed into the occupation of a servant of the government for a public purpose? The only argument put forward for this contention is, that power is given to the manager of the school to detain the children, and that that makes the manager a servant of the government. I cannot think this is so. There may be many other cases in which the same power is given. There are the cases of private lunatic asylums where the proprietors are authorized to detain the lunatics; but it cannot be said that a private lunatic asylum is exempted from

(1) 16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182. 10 Jur. N.S. 799.

(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. N.S. 746

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rateability. It seems to me that the appellant remains still what he was before, a person occupying land for a very proper purpose of charity, but that he is not exempted from the poor-rate, and that the parish have not lost, from the fact of his being charitable, the right of rating him.

MELLOR, J. I am of the same opinion. I think it cannot be said, on the facts of this case, that this is a building occupied by the servants of the Crown, or by those who stand, as has been said, in simili casu with servants of the Crown. This is a private charity in its origin. The buildings belong, not to the Crown or the government, but to the charity. No doubt the charity is one to which the secretary of state is empowered to give a certificate, and it then becomes a certified industrial school for the purposes of receiving the persons named in 29 & 30 Vict. c. 118. It is quite true that a prison authority has also, under certain circumstances, power to contribute towards the enlargement or rebuilding or the maintenance of a school so certified. The Treasury are also authorized to contribute towards the maintenance of each of the persons who are received under an order of justices. But still for all that it remains a private institution. Although the statute gives a power of detention to carry into effect the sentence of the justices, it merely lends the assistance of the government to enable a private charity to become, in point of fact, a certified industrial school, but only so long as the managers of the charity think fit, for under s. 45 the managers by giving the requisite notice may resign the certificate and resume their former position. I am of opinion that this case does not come within the exemption laid down in the *Mersey Dock Case* (1), and that the appellant is rateable.

Judgment for the respondents.

Attorneys for appellant: *Pitman & Lane, for R. Baxter, Liverpool.*

Attorney for respondents: *T. W. Goldring, for R. Holden & Cleaver, Liverpool.*

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

SMITH *v.* THE UNION BANK OF LONDON.

1875
April 27.

*Bankers' Cheque, Effect of Crossing with Name of Banker—Bonâ fide Holder for Value—*21 & 22 *Vict. c.* 79, *s.* 2.

A. being indebted to plaintiff, gave him a cheque for 21*l.*, payable to plaintiff's order, on the defendants, a banking company. Plaintiff having indorsed his name on the cheque, crossed it with the name of his bankers, "London and County Banking Company;" the cheque was stolen from plaintiff, and sold by the thief to B., for 8*l.* 10*s.*; B. passed it for full value to C., who took it bonâ fide, and afterwards paid it into his bankers, the London and Westminster Bank, and they presented it to the defendants, who paid it to them notwithstanding the crossing. The plaintiff brought an action against the defendants for so paying the cheque, and also for a conversion, relying on 21 & 22 Vict. c. 79, s. 2, which enacts, that a cheque on a banker, payable to order or bearer, and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the cheque, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:—

Held, that the plaintiff could not recover against the defendants. The statute did not affect the negotiability of the cheque; the plaintiff had indorsed the cheque, so that C. became the bonâ fide holder of it for value before it was presented to defendants, and plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants.

Affirmed 2 Q.B.D. 31 C.A.

CASE stated by consent.

This is an action for the recovery of 21*l.* 9*s.*, the amount of a cheque drawn by Richard Mills and others, the trustees or directors of the Civil Service Co-operative Association, upon the defendants, payable to the plaintiff's order; which cheque on the 9th of January, 1874, the Civil Service Co-operative Association delivered to the plaintiff in payment of a debt of 21*l.* 9*s.* from them to him. The plaintiff accepted the cheque in payment, conditionally on its being honoured, and gave the Association a receipt for 21*l.* 9*s.*

The plaintiff banked with the London and County Banking Company, and, having indorsed his name on the cheque, crossed it with the name of the London and County Banking Company.

While the plaintiff's servant was taking the cheque to the plaintiff's bankers, it was stolen from him, and sold by the thief to Robert Thurger, for 8*l.* 10*s.*, who passed it for full value to C. (1),

(1) It appears to have been assumed by the Court, on the argument, that C. took the cheque bonâ fide.

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a customer of the London and Westminster Bank, and C. soon afterwards paid it into the London and Westminster Bank; they presented it to the defendants for payment and the defendants paid it to the London and Westminster Bank, and returned it to the drawers.

At the time the defendants paid the cheque it was crossed with the name of the plaintiff's bankers, the London and County Banking Company, and with two transverse lines, and such crossing was made and placed on the cheque by the plaintiff in such manner as to form and be a material part of the cheque within 21 & 22 Vict. c. 79, s. 2. (1)

The name of the London and Westminster Bank was not written across the cheque when it was paid by the defendants.

The question for the opinion of the Court was whether the plaintiff is entitled to recover from the defendants for so paying the cheque, or for converting the same.

J. Brown, Q.C. (with him, *E. Thomas*), for the plaintiff. The statute 21 & 22 Vict. c. 79, ss. 1 & 2, absolutely prohibits the

(1) 21 & 22 Vict. c. 79, s. 1:—"Whenever a cheque or draft on any banker, payable to bearer or to order, on demand, shall be issued, crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered, by any person whomsoever after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker."

Sect. 2: "Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words 'and company' or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same remains so uncrossed, or crossed with the words 'and company' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and company' or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to, or altered by any person whomsoever after the making thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid."

payment of a crossed cheque otherwise than through the banker with whose name the cheque is crossed; the only exception being in s. 4, in cases where the crossing has been obliterated; which was not the case in the present instance. The former statute, 19 & 20 Vict. c. 25, was passed owing to the decision in *Carlon* v. *Ireland* (1), in which it was held that the custom of bankers as to crossed cheques did not affect the liability of a banker who paid it, if it were shewn that he acted bonâ fide and without negligence. That Act was found not to go far enough, and the present statute was passed, which makes the crossing a material part of the cheque. Sect. 2 expressly empowers the holder to cross the cheque, so that it is clear that it was intended for the protection of other persons beside the drawer.

[BLACKBURN, J. The customer of the London and Westminster Bank was the bonâ fide holder.]

It is not so found in the case.

[BLACKBURN, J. That must be assumed from his having given full value for it, unless the crossing prevents him from taking it bonâ fide, and to hold that would be to restrain the negotiability of cheques. If the cheque remained the property of the plaintiff, he could sue the defendants for the conversion by dealing with it; but had not the plaintiff, by indorsing it, enabled a bonâ fide holder for value to acquire property in it? And in an action for the conversion would not the plaintiff fail on the issue of not possessed?]

The statute was passed for the protection of holders as well as drawers, and the plaintiff has been injured by the defendants' neglect of the duty expressly imposed upon them by the statute, not to pay the cheque otherwise than through the bankers named in the crossing.

[BLACKBURN, J. Unless the plaintiff could have sued the bonâ fide holder for value for money had and received, he has not been injured.]

By disobeying the enactment the defendants have deprived the plaintiff of the protection intended by the statute. If they had refused payment to the London and Westminster Bank, inquiries would have been made, and the cheque eventually would have been stopped. [He referred to *Ogden* v. *Benas*. (2)]

(1) 5 E. & B. 765; 25 L. J. (Q.B.) 113. (2) Law Rep. 9 C. P. 513.

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Thesiger, Q.C. (with him *D. Walker*) for the defendants. *Bellamy* v. *Marjoribanks* (1) was another case before the passing of 19 & 20 Vict. c. 25. After that Act, came *Simmons* v. *Taylor* (2), in which it was held that the crossing was no part of the cheque, and therefore the obliteration of it was not forgery, and the banker not liable for paying to a private person, without negligence. This led to the passing of the present statute, which altered the law on both points. But there is nothing in the statute to alter the relation between the payee or holder of a cheque, and the bankers upon whom it is drawn.

[BLACKBURN, J. If the bankers pay a crossed cheque otherwise than through the banker named, and it turned out that the person for whom it was presented was not the true holder, the bankers would be liable to the true holder for the conversion.]

By 16 & 17 Vict. c. 59, s. 19, the bankers are not bound to see to the validity of the indorsement. In Byles on Bills, p. 23 (11th ed.), it is said: "The legislation on this subject still seems to leave the result of the judicial application of the common law to crossed cheques much as it stood originally, except that the crossing is made part of the cheque; that the payment of a crossed cheque otherwise than through a banker is not merely strong evidence of negligence, but is a void payment; and that when a particular banker is named in the crossing, his name must not be erased, and the payment must be through that banker." If the payment here is void, the money paid by the defendants was not the drawers', and the plaintiff has his remedy against the drawers. At all events the plaintiff has no right of action against the defendants.

[BLACKBURN, J. So far I agree, that, on the plea of not possessed, the defendants would be entitled to the verdict, on their shewing that the plaintiff had indorsed the cheque, and that it had afterwards come into the hands of a bonâ fide holder for value.]

That is sufficient to entitle the plaintiff to judgment.

J. Brown, Q.C., in reply. The effect of the statute is to make the payment void. The defendants have violated the statute,

(1) 7 Ex. 389; 21 L. J. (Ex.) 70.

(2) 2 C. B. (N.S.) 528; 4 C. B. (N.S.) 463; 27 L. J. (C.P.) 245; 248.

3 Jur. N.S. 1305 4 Jur. N.S. 412.

which was clearly passed for the protection of holders of cheques, as well as drawers, and if the defendants are not liable, the protection intended is rendered a nullity.

BLACKBURN, J. In this case, although the amount in dispute is small, the point is of considerable importance. However, I think we cannot feel much doubt about it, and therefore we may decide it at once. I am of opinion that the defendants are entitled to our judgment, and that the plaintiff fails to make out his case. I wish to say deliberately that I do not put my decision upon the ground that the bankers would not have been liable at common law in trover. I think they would have been liable for a conversion of this cheque, if they had paid it to anyone but the lawful holder. I take it that the effect of the statute is that the cheque still remains negotiable. The lawful holder of it cannot sue the drawer until he has presented it to the banker, and it has been dishonoured; he cannot present it to the banker effectually, so as to make the cheque be dishonoured, and enable him to fall back upon the drawer, except through the banker with whose name it has been crossed; but if he does present it through that bank (here the London and County Bank), and the banker upon whom it is drawn pays it, then the payment is perfectly good by the banker: all is right, and nothing can be found fault with at all. But in the present case the defendants, the bankers, who have paid it to the holder through another banker, without requiring presentment to be made through the bankers whose name was crossed upon it, have done a thing by which they have disobeyed the statute; and if the defendants had paid the cheque through the London and Westminster Bank to a person who was not the lawful holder and did not take it bonâ fide, they have paid it to a man who was not lawful owner, and I think they would have no defence at the suit of the real owner. But they in fact paid it, though through a wrong banker, to the real holder of the cheque, and therefore, though they did wrong, no one is damnified. This does not diminish the security given by crossed cheques; for if a cheque were drawn payable to order and then crossed, and the person to whose order it was drawn indorsed it specially to his bankers, or kept it unindorsed altogether, in either of these cases,

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if a thief got it and were to make a forged indorsement, the person who, in ignorance, took it, even for value, would not be holder at all, and anyone who took the cheque from him, and converted it to his own use, would be liable to the true holder in trover. If the cheque had not been crossed, there would have been an exception in favour of the banker on whom it was drawn, who is protected by the words of the statute, in the case of a forged indorsement, if what he does is done bonâ fide (1); but if the cheque be crossed to a particular banker, and he pays it, however bonâ fide, to another banker to whom it was not crossed, then he is not protected, and trover would lie against him at the suit of the true holder. Therefore there are obvious reasons why bankers should not and do not in practice generally pay cheques to any bank but the one whose name is across the cheque; because they can do themselves no benefit, and they do not protect their customers, and may incur a very serious liability. But when it happens that they have paid to the right holder, though through a wrong banker, I do not see how anybody can complain, or bring an action at all.

1 Q.B.D. 35

Mr. Brown argues that if the defendants had not paid this cheque, the London and Westminster Bank would have given it back to the holder, and he could not have got payment without applying to some one to present it for him through the London and County Bank; and that, no doubt, would have given some protection in the way of ascertaining who was the real holder; but if the person who paid it into the London and Westminster Bank was the real holder, there is no reason why he might not pass it on to others. It is a very common practice, when a crossed cheque is given to a person who has not a banker, that he hands it to another, and he to another, and ultimately the person who seeks to cash it puts the name of his banker upon it, and gives it to his banker. So if I draw a cheque, intending to send it to a tradesman, and cross it with the name of the banker, who used to be his banker but had ceased to be his banker unknown to me, there would be nothing in the statute, or common sense, or propriety, to prevent the tradesman going to anyone else, giving him the cheque, and getting him to pay it into his banker who

(1) See 16 & 17 Vict. c. 59, s. 19.

happened to be the one named. These are but instances to show how it would be very inconvenient if the negotiability of the draft was stopped altogether, because crossed with a particular banker's name. There are excellent reasons why care and caution should be taken, and why the bankers on whom it is drawn should require the cheque to come through the proper banker, as affording a protection against fraud. If they do not, they incur a liability to the true holder of the cheque, whoever he may be; but they do not incur a liability to the person who, having lost it (after he has indorsed it), ceases to be true holder, because it has come into the hands of a person who bonâ fide gave value for it, and so became the true holder of the cheque; but if he had not been the bonâ fide holder, though he did give full value, he would not be the true holder, and then the banker could not safely pay the cheque through any but the banker named.

I think, therefore, that the defendants are entitled to judgment; it will in effect be, that although they may have been guilty of a conversion, the plaintiff cannot recover, because the plaintiff was not possessed of the cheque.

FIELD, J. I am of the same opinion. It was said, on behalf of the plaintiff, that the statute has created a duty on the part of the banker not to pay otherwise than to the banker whose name was crossed on the cheque. There is no doubt, I think, that the duty was so created. The question still remains whether it was a duty to the plaintiff under the circumstances of this case. Now in what way was there that duty towards the plaintiff? He, at the time the cheque was presented, had ceased to be the legal holder of the cheque. It seems to be quite clear that the statute never intended, any more than the old custom did, to restrain the negotiability of the cheque. The cheque therefore came into the hands of a bonâ fide holder for value. It became his property. Therefore it seems to me neither upon the allegation of breach of duty, nor on a count in trover, is the plaintiff entitled to recover against the defendants.

Judgment for the defendants.

Attorney for plaintiff: *J. Terry.*
Attorneys for defendants: *Lyne & Holman.*

1875
May 3.

WRIGHT *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Negligence—Master and Servant—Licensee—Railway Company, Duty of, towards Customer assisting Railway Servants in delivering his Goods.

The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to P. station. On the arrival of the train at the station, there being only one porter available to shunt the horse-box to the siding from which alone the heifer could be delivered to the plaintiff, he was allowed, in order to save delay, to assist in shunting the horse-box, and while he was so assisting he was run against and injured by a train which was negligently allowed to come out of the siding. There was evidence from which the jury might find that the plaintiff was assisting in the shunting with the assent of the station-master:—

Held, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his heifer; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123).

Affd on Appeal (10 BD. 252.)

FIRST count, that the plaintiff had to take delivery of a heifer which had been sent in a box or truck by the defendants' line of railway to their station at Penrith, and the plaintiff by the request of the defendants, and by their permission, was on the railway assisting in the removal of the box or truck to a siding; that the defendants so negligently conducted a certain engine on the railway that it came into collision with the box, and the plaintiff was knocked down and injured.

Second count, that the defendants acted so negligently in the management of an engine, horse-box, and trucks, on the defendants' railway, that the plaintiff, who was by the permission of the defendants, and by their invitation, lawfully on the railway, was knocked down and injured.

Third count, that in consideration that plaintiff at request of defendants would deliver to defendants a heifer to be safely carried by them from Windermere to Penrith for reward to the defendants, and that plaintiff would accompany the heifer on the journey, and would assist in taking delivery of the heifer at Penrith, the defendants promised the plaintiff that they would take reasonable care of the heifer and the plaintiff on the journey and until they should deliver the heifer at Penrith to the plaintiff,

yet the defendants were guilty of negligence, &c., as in the other counts.

Pleas: 1. Not guilty to first and second counts.

2. To the first count, that plaintiff was not assisting in the delivery of the heifer at the request and by the permission of the defendants.

3 and 4. To the third count, traversing respectively the promise and the breach.

Issue joined.

At the trial before Pollock, B., at the Cumberland summer assizes, 1874, it appeared that the plaintiff, on the 27th of March, 1873, sent a heifer by the defendants' railway to the Penrith station. On the arrival of the train at that station between 8 and 9 p.m., the horse-box into which the heifer had been put had to be shunted from the line to a siding in order to get the heifer out. The station is a small one, and there was only one porter available to shunt the horse-box, and the plaintiff, who had travelled by the same train, being desirous of getting his heifer without delay, assisted in shunting the horse-box to the siding, from which alone the heifer could be delivered to him, and while he was doing so the horse-box was run into by a train which had been negligently allowed to come out of the siding; and the horse-box was driven against the plaintiff and injured him. There was evidence that it was the practice at the Penrith station for persons having cattle, &c., to assist in the shunting of the trucks; and there was also some evidence that on this particular occasion the station-master had assented to the plaintiff taking part in the shunting. The defendants called no evidence.

The learned judge was of opinion that the case was not governed by *Degg* v. *Midland Ry. Co.* (1), and directed a verdict for the plaintiff, the only question left to the jury, by consent, being the amount of damages, which they assessed at 162*l.*; leave being reserved to move to enter a nonsuit or a verdict for the defendants.

A rule was obtained accordingly, on the ground that the plaintiff was assisting the servants of the defendants and was in the same position as the servants, and that there was no evidence of the

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171.

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negligence of any person for whose negligence the defendants were under the circumstances liable.

Herschell, Q.C., shewed cause. The defendants rely on *Degg* v. *Midland Ry. Co.* (1), affirmed in the Exchequer Chamber by *Potter* v. *Faulkner.* (2) But the present case is distinguishable. Erle, C.J., in delivering judgment in that case, says: "This is the case of one who volunteers to associate himself with the defendants' servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect of their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ."

[FIELD, J. Was there any duty here on the part of the defendants towards the plaintiff?]

Yes. They admit him on their premises for the purpose of assisting in the delivery of cattle which they are bound to deliver to him. *Holmes* v. *North Eastern Ry. Co.* (3) is directly in point, that where a person is on premises of others, with their assent, engaged in a transaction of common interest to both parties, the owners of the premises are liable for the negligence of their servants in the course of the transaction. It was not disputed at the trial that there was negligence in permitting the train to come out of the siding.

[COCKBURN, C.J. But was there any evidence of the defendants having assented to the plaintiff's taking part in the shunting?]

If evidence of the general practice at the Penrith station was not sufficient, there was evidence from which the jury might well have found that the station-master was aware of and assented to the plaintiff's taking part in the shunting.

The Court then called upon

Aspinall, Q.C., in support of the rule. The case is within the decision of *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner.* (2) In *Holmes* v. *North Eastern Ry. Co.* (3) both Bramwell and

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171.
(2) 1 B. & S. 800, 806; 31 L. J. (Q.B.) 30.
(3) Law Rep. 4 Ex. 254.

Channell, BB., had great doubts as to the propriety of the decision. (1) There was no evidence that the station-master knew what the plaintiff was doing; but even if it be taken that the station-master assented, that would make no difference.

COCKBURN, C.J. The rule must be discharged. There was evidence upon which the jury might have found, and they must be taken to have found, that the plaintiff was assisting in the shunting of the horse-box with the assent of the station-master, that is, with the assent of the company. The plaintiff was therefore not a mere volunteer, as in *Degg* v. *Midland Ry. Co.* (2), but was on the railway for the lawful purpose of assisting in the landing of his goods, with the consent of the company, and the case is therefore within the decision of *Holmes* v. *North Eastern Ry. Co.* (3)

FIELD, J. I am of the same opinion. The station-master was the agent of the company to deliver the heifer, and was therefore the person to give assent on behalf of the company to what would otherwise have been out of the usual course; and the case is therefore within the decision of *Holmes* v. *North Eastern Ry. Co.* (3)

Rule discharged.

Attorneys for plaintiff: *Johnston & Harrison, for Harrison & Little, Penrith.*

Attorney for defendants: *R. F. Roberts.*

(1) *Holmes* v. *North Eastern Ry. Co.* was affirmed in the Exchequer Chamber: see Law Rep. 6 Ex. 123.

(2) 4 H. & N. 773; 26 L. J. (Ex.) 171.

(3) Law Rep. 4 Ex. 254; in error Law Rep. 6 Ex. 123.

1875
May 10.

CRAWLEY *v.* PRICE AND OTHERS.

Ejectment—Landlord and Tenant—Agreement for Lease, Construction of—Proviso for Re-entry.

By an agreement in writing, but not under seal, plaintiff agreed to let and defendant to hire on lease for twenty-one years a house, &c., on the following terms: The rent to be 55*l.* per annum; the lease to commence from the 25th of March next, and to contain an extract of the covenants in the original lease which the plaintiff is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of the plaintiff. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. Defendant entered and paid rent, and underlet the premises without the consent of plaintiff, who thereupon brought ejectment, and was nonsuited:—

Held, that the nonsuit was right. Defendant held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, and the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting; and, on the authority of *Shaw* v. *Coffin* (14 C. B. (N.S.) 372), on mere words of agreement a condition could not be created.

EJECTMENT, H. Braun being admitted to defend as landlord.

At the trial before Bramwell, B., at the Surrey summer assizes, 1874, it appeared that the following agreement as to the premises in question was entered into between the plaintiff and Braun: "An agreement made this 4th June, 1867, between Mr. J. Crawley, on the one part, and Mr. H. Braun on the other part. Crawley hereby agrees to let, and Braun hereby agrees to hire, on lease for twenty-one years, all that house, garden, and meadow belonging to Crawley, and now in the possession of Braun, on the following terms: that is to say, the rent to be 55*l.* per annum clear of all rates, taxes, and outgoings whatever (excepting property tax), payable quarterly; the lease to commence from the 25th of March, 1869, and to contain an extract of the covenants mentioned in the original lease which Crawley is bound under, and to be prepared by Mr. J. Chapple at the expense of Braun; that the proposed lease shall not be sold, parted with, or any portion of the property underlet, without the consent in writing of Crawley; and, further, that the small yard at the end of the garden be given

up immediately on application, either before or after signing the agreement. As witness our hands, the day and year first above written." (Signed by both parties.)

The original lease, under which the plaintiff held by assignment, was an indenture of the 13th of December, 1842, between W. A. Bowyer and George Hayden, for seventy-five years, at a yearly rent of 28*l.*, and contained six covenants by the lessee: 1, to pay the rent; 2, to keep in repair; 3, to bear part of the cost of keeping a road in repair; 4, to insure; 5, not to erect any building; 6, not to carry on certain offensive trades. "Provided always that if the rent shall be unpaid for twenty-one days after it ought to be paid, or if the lessee, his executors, &c., shall not in all things well and truly observe and keep all and singular the covenants and agreements on his part to be observed, then and in any of the said cases it shall be lawful for the lessor, his heirs, &c., to enter upon the demised premises, and the same to re-possess as of his former estate, and the lessee and his tenants thereout to remove, this indenture notwithstanding."

The defendant Braun entered under the agreement of 1867, and paid rent, and afterwards underlet without the plaintiff's consent in writing; whereupon this ejectment was brought as upon a forfeiture.

The learned judge nonsuited the plaintiff, giving leave to move to enter a verdict for the plaintiff.

A rule was obtained accordingly, on the ground that, on the documents and evidence adduced at the trial, the plaintiff was entitled to re-enter on the premises by reason of the defendants having violated the stipulation not to underlet contained in the agreement between the plaintiff and Braun.

Francis shewed cause. The clause in the agreement between the plaintiff and Braun not to underlet without consent in writing is merely an agreement and cannot create a condition so as to give a right of re-entry for breach: *Shaw* v. *Coffin* (1), in which *Doe* v. *Wall* (2) is distinguished, on the ground that the word "condition" was there used. Secondly, admitting the agreement is to be read as if the covenants of the original lease were set out in it,

(1) 14 C. B. (N.S.) 372. (2) 8 B. & C. 308.

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and the proviso for re-entry also incorporated, still, as there is no covenant not to underlet, the proviso will not apply; and the agreement cannot be read so as to make the proviso for re-entry extend to the new clause not to underlet.

Willis, in support of the rule. No doubt the plaintiff cannot maintain the first point. But on the true construction of this agreement, a Court of equity would direct a lease to be drawn up with the six covenants of the original lease, and a seventh as to not underletting, and the Court would make the proviso for re-entry apply to all the seven covenants.

[BLACKBURN, J. Possibly if the defendant had applied to a Court of equity for a specific performance by the execution of the lease under seal, he would have been compelled to accept a lease in the form suggested; but that is not the question here. The question is, whether on the agreement as it stands, coupled with the lease, there is any right of re-entry for underletting without consent.]

COCKBURN, C.J. The rule must be discharged. It is quite clear, upon the agreement itself, taken alone, that there is no right of re-entry; and *Shaw* v. *Coffin* (1) is an express authority, if authority were wanting, that on a mere agreement no condition for re-entry can be implied. But it is said on behalf of the plaintiff, that the terms of the original lease are incorporated into the agreement, and the covenants and proviso for re-entry are binding on the defendant, and so far I agree. But then it is said further that the proviso for re-entry would attach to this clause as to not underletting which is not one of the covenants in the original lease, and is therefore matter of agreement only, but which would become matter of covenant when the lease is executed. But I think that the proviso cannot be made to apply to this clause, which is not contained in the former lease. It would be a very forced construction so to read the agreement, and would in effect be creating a condition for re-entry on mere words of agreement. I doubt whether a Court of equity would interfere in the way my Brother Blackburn seems inclined to think it would; but it is sufficient to say that the plaintiff has not made out his right of re-entry, and was therefore properly nonsuited.

(1) 14 C. B. (N.S.) 372.

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BLACKBURN, J. I am of the same opinion. The agreement is in writing, but not under seal, so that it is not a demise, but only an agreement to grant a lease; however the lessee entered under it, and as soon as he paid rent he became tenant from year to year on the terms of the agreement, so far as they are applicable to such a tenancy. Now, part of the terms is that the premises are not to be underlet without the consent of the plaintiff: and *Shaw* v. *Coffin* (1) is conclusive that on a mere agreement a proviso for re-entry cannot be created. Then it is said that the agreement stipulates that extracts of the covenants in the original lease are to be contained in the lease. There are six covenants in the original lease, with a proviso for re-entry on the breach of any of them; and I am of opinion in the plaintiff's favour thus far, that I think the proviso would be incorporated in the agreement as to those six covenants; but I cannot agree that the agreement is to be read as if the six covenants were in it, and then a seventh as to not underletting, and then the proviso for re-entry on the breach of any one of the seven. It may well be that if the plaintiff had given a notice to quit, and the aid of a Court of equity had been invoked by the defendant, that the Court of equity in its decree would have made the proviso apply to all the covenants. I do not express any opinion on this point; all I decide is, that in a Court of law, upon the agreement and facts as they at present stand, the plaintiff had no right of re-entry on breach of the agreement not to underlet without his consent in writing. To hold otherwise would in effect be to decide contrary to *Shaw* v. *Coffin*. (1)

MELLOR, J. This agreement not being under seal, all the matters in it are mere matters of agreement, and no condition for re-entry would be created by it. But the agreement says that extracts from the covenants in the original lease shall be contained in it, and I think it must be reasonably interpreted, in the way my Lord and my Brother Blackburn have suggested, that the old covenants and the proviso are made part of the agreement. But this new stipulation as to not underletting was not in the lease, and the proviso for re-entry cannot be extended to it.

QUAIN, J. I confess that I feel considerable difficulty in this

(1) 14 C. B. (N.S.) 372.

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case. The only way in which I can agree with the decision of the rest of the Court is by reading the agreement as incorporating the covenants in the original lease, but not incorporating the proviso for re-entry; for if the proviso were introduced into the agreement, I think it must apply to the stipulation as to not underletting as well as to the other covenants. But looking at the agreement as it stands in the way I have suggested, I agree with the rest of the Court that the plaintiff was rightly nonsuited.

Rule discharged.

Attorneys for plaintiff: *Chappell & Wilson.*
Attorneys for defendant: *Scott & Sons.*

April 27.

TERRY *v.* THE BRIGHTON AQUARIUM COMPANY.

Profanation of the Lord's-day or Sunday—21 *Geo.* 3, *c.* 49, *s.* 1—"*Place of Entertainment or Amusement.*"

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The defendants, a company incorporated by an Act of Parliament, are the owners of the Brighton Aquarium, a building which consists of chambers below the level of the ground, and a terrace above. The chief part is used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. There is also a reading-room, with newspapers, and a restaurant and dining-hall, and conservatories. The whole is open to the public on Sunday on the payment of 6*d.* each person. A band plays sacred music on the evenings of Sunday, and programmes are issued, stating what music the band will play, and at what time the fish will be fed. An action having been brought against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment and amusement on the Lord's-day or Sunday:—

Held, that the aquarium, under the above circumstances, was a place of entertainment and amusement within the statute.

CASE stated by consent without pleadings.

The action is brought to recover a penalty of 200*l.*, alleged to have been incurred by the defendants under 21 Geo. 3, c. 49, s. 1 (1), on Sunday, the 6th of September, 1874.

(1) 21 Geo. 3 c. 49:

"An Act for preventing certain Abuses and Profanations on the Lord's-day, called Sunday."

"Whereas certain houses, rooms, or places, within the cities of London or Westminster, or in the neighbourhood thereof, have of late frequently been opened for public entertainment or amusement upon the evening of the Lord's-day, commonly called Sunday; and at other houses, rooms, or places,

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The defendants are a company incorporated by the Brighton Aquarium and Improvements Act, 1869 (32 & 33 Vict. c. lxxxviii), and have constructed a large building at Brighton, called the Brighton Aquarium, which they have always kept until the present time under their own management and control.

This building consists of a range of chambers below the level of the ground approached by a flight of steps. There is also a terrace bordered with a garden laid out above the chambers. The chief part of the building is used as an aquarium, fitted with glass tanks for the exhibition of marine fish and animals. There is also an entrance-hall, which is used as a museum and a reading-room. A restaurant and dining-hall adjoin the entrance-hall, and there are other parts of the building fitted up as conservatories, with artificial grottoes, rockwork, and cascades. On the terrace, which is supplied with seats and refreshment tables, there is a café.

The building, and terrace, and garden are open to the public every day in the week, payment for admission being made at the

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within the said cities, or in the neighbourhood thereof, under pretence of inquiring into religious doctrines, and explaining texts of Holy Scripture, debates have frequently been held on the evening of the Lord's-day, concerning divers texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to the great encouragement of irreligion and profaneness; be it enacted by &c., that from and after the passing of this present Act, any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's-day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of 200*l.* for every day that such house, room, or place, shall be opened or used as aforesaid on the Lord's-day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the Lord's-day, shall likewise, for every such offence, forfeit the sum of 100*l.* to such person as will sue for the same; and every doorkeeper, servant, or other person, who shall collect or receive money or tickets from persons assembling at such house, room, or place, on the Lord's-day, or who shall deliver out tickets for admitting persons to such house, room, or place, on the Lord's-day, shall also forfeit the sum of 50*l.* to such persons as will sue for the same."

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entrance. The charge for admission on all days, except Sunday and Monday and the evenings of other days, is 1*s.*, the hours of admission in the months of August and September, 1874, being from 10 a.m. to 10 p.m. daily. In October, November, and December, 1874, the hours of admission have been from 10 a.m. to 10 p.m. on week days, and 11.30 a.m. to 9.30 p.m. on Sundays. The charge for admission throughout Sunday and Monday, and after seven o'clock on the evenings of the other days is 6*d.*

At half-past seven o'clock every Sunday evening a band of sixteen performers plays a selection of sacred music in the interior of the building.

The fish and other animals in the aquarium are publicly fed at certain stated hours of the day.

Programmes are published weekly by the defendants, shewing the music to be performed on each Sunday, and the times at which the feeding of the fish and animals will take place. These programmes also state the different attractions and objects of interest exhibited to the public in the interior of the building. These programmes are sold on Sundays, as well as on other days, inside the building.

Catalogues and guide-books describing the fish and other animals in the aquarium, are also sold on Sundays in the building.

The restaurants and café, within and connected with the building, are open to the rest of the aquarium on Sunday, and refreshments of all kinds, including wines and spirits, are sold to all visitors during the hours allowed by law, and in the intervals to all who produce railway tickets as evidence of their being travellers.

Among the attractions and objects of interest provided in the building for the amusement and entertainment of visitors, besides the tanks and their contents, are newspapers, microscopes illuminated to allow of the examination of objects, the model of a yacht, the skeleton of a seal, a stuffed sturgeon, the cast shell of a crayfish, several statues, and fourteen glass vases on stands containing sea-horses, tube-worms, and anemones, &c.

The number of persons employed by the company in and about the building on Sundays, including bandsmen and attendants of all descriptions, amounts to twenty-seven. There are also various

cooks, waiters, and other attendants employed by the contractor of the refreshment department.

Advertisements have from time to time appeared in the London papers, announcing that the aquarium is open daily, and notices have likewise been exhibited outside the building, specifying the hours and prices of admission for Sunday and the other days of the week.

A great number of people visit the aquarium every Sunday, especially at the time of the musical performance, and the restaurant and café are in much request, and the defendants have made considerable pecuniary profits from the admission of the visitors.

On Sunday, the 6th of September, 1874, the aquarium was opened to the public on payment, as on other Sundays, at the hours and in the manner stated in the preceding paragraphs of the case.

The question for the opinion of the Court is whether, under the circumstances above stated, the Brighton Aquarium, or any part thereof, was opened or used for public entertainment or amusement on any part of the Lord's day contrary to 21 Geo. 3, c. 49, s. 1.

H. S. Giffard, Q.C. (with him *Bosanquet*), for the plaintiff. The aquarium with its various objects of interest and amusement, and with its restaurant, &c., is clearly a place of entertainment and amusement within s. 1 of 21 Geo. 3, c. 49. The only late case on the subject is *Baxter* v. *Langley* (1); but that was a very different case from the present.

[FIELD, J., referred to *Marks* v. *Benjamin*. (2)]

Manisty, Q.C. (with him *McMillan*), for the defendants. It is well known that the statute was passed in consequence of the Lord George Gordon riots, and the preamble shews what kind of entertainment and amusement was aimed at.

[BLACKBURN, J. It has been decided over and over again that the preamble of a statute cannot cut down the general words of the enacting part.]

THE COURT (Blackburn and Field, JJ.), regretting to be obliged

(1) Law Rep. 4 C. P. 21. (2) 5 M. & W. 565.

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to do so, held it impossible to say that the aquarium was not a place of entertainment and amusement within the statute.

Judgment for the plaintiff. (1)

Attorneys for plaintiff: *Bridges, Sawtell, & Co.*
Attorneys for defendants: *Benham & Tindell.*

May 3.

THE QUEEN, ON THE PROSECUTION OF JOHN SPURWAY, *v.* VENN AND ANOTHER.

Copyhold—Custom of Manor—Lord having only a temporary Estate—Qualified Right to grant Reversion.

The manor of M. was appendant to a rectory, and by the custom of the manor the tenements might be granted for lives in possession and in reversion; by one of the customs it was declared that, "if any man have taken a reversion, and the lord die that granted the same, and the said reversion being out of possession, the next lord may lawfully set again":—

Held, that the meaning of the custom was, that where a reversion happens not to have come into possession at the time of the death of the lord granting it, the succeeding lord may treat the reversion as a nullity and lease again, and that such custom was not unreasonable.

SPECIAL CASE stated by order of the Court after a writ of mandamus issued.

1. The manor of Manley is situate in the parish of Tiverton, in the county of Devon, and is appendant to the rectory of the portion of Clare in the same parish, the whole parish of Tiverton containing four rectories or portions.

2. In 1785 the Rev. Henry Land was rector of the parish of Clare, and as such was lord of the manor of Manley.

3. At a court held on the 13th of May, 1785, upon the surrender of T. M. Marshall (the then tenant of the two several messuages and tenements hereinafter mentioned), T. M. Marshall and Henry Land and John Land, sons of the Rev. Henry Land, took of the lord of the manor the two several and respective messuages and tenements called "Hukeleys" and "Prowses," parcels of the manor by separate admissions, to hold to them successively for their lives

(1) See *Warner* v. *Brighton Aquarium Co.*, Law Rep. 10 Ex.

and the life of the longest liver of them, according to the custom of the manor, by the rents therefor due and of right accustomed.

4. In or about 1794, T. M. Marshall died, leaving his widow, Letitia Marshall, who, as such widow, was, down to the time of her death, in 1844, entitled to the possession of the two messuages and tenements according to the custom of the manor.

5. In 1794, Henry Land, son of the Rev. Henry Land, died.

6. In 1813, the Rev. William Spurway was rector of the portion of Clare and lord of the manor of Manley, and at a court held in and for the manor on the 6th of March, 1813, Peter Pasmore was admitted tenant of and to the reversion of all that messuage and tenement called Hukeleys, parcel of the manor, to hold unto Peter Pasmore and his assigns, for and during the natural life of John Monday, son of Ann, the wife of Peter Pasmore, according to the custom of the manor, from and immediately after the deaths, surrenders, forfeitures or other determinations of the estate and interest then therein, for the lives of Letitia Marshall, widow, and John Land, under certain yearly rents and an heriot. The consideration paid by Peter Pasmore was 200*l.*

7. At the same court, in consideration of the sum of 50*l.* then paid to the Rev. William Spurway by Peter Pasmore, he, Peter Pasmore, was admitted in the same terms as in the last paragraph mentioned tenant of and to the reversion of the messuage and tenement called Prowses, parcel of the manor.

8. At a court held on the 14th of February, 1817, the Rev. William Spurway, lord of the manor of Manley, admitted his son, the Rev. John Spurway (the prosecutor of this mandamus), tenant of and to the reversion of the tenement called Hukeleys, to hold unto John Spurway and his assigns for and during the natural life of him, John Spurway, according to the custom of the manor, from and immediately after the death, surrenders, forfeitures, or other determination of the estate and interest then therein, for the lives of Letitia Marshall, widow, John Land, and John Monday, under a yearly rent and an heriot when it should happen.

9. At the same court the Rev. William Spurway granted the reversion of the tenement called Prowses to his son, the said Rev. John Spurway, for the life of John Spurway, by a grant in similar terms to the grant of Hukeleys, mentioned in the last paragraph

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under the rent of 4*s.* 8*d.* and a heriot when it should happen, &c., and the Rev. John Spurway was duly admitted tenant.

10. In 1826, John Land, one of the lives mentioned in the grant of the 13th May, 1785, died, and thereupon, at a court held on the 12th of July, 1826, the Rev. John Spurway was admitted tenant of and to the reversion of Hukeleys, to hold unto John Spurway and his assigns for and during the natural life of William Spurway, son of John Spurway, according to the custom of the manor, from and immediately after the death, surrender, forfeiture, or other determination of the estate and interest therein, for the lives of Letitia Marshall, widow, John Monday, and John Spurway, under certain yearly rents and an heriot.

11. At the same court the Rev. William Spurway granted the reversion of the tenement called Prowses to the Rev. John Spurway for the life of William Spurway (son of the Rev. John Spurway), on terms similar to the grant of Hukeleys, under the rent of 4*s.* 8*d.* and an heriot when it should happen, &c.; and the Rev. John Spurway was duly admitted tenant.

12. In 1837, the Rev. William Spurway, lord of the manor of Manley, died, and the Rev. John Daniel Lloyd having been duly presented and inducted to the rectory of the portion of Clare, became thereby lord of the manor of Manley.

13. In 1844, Letitia Marshall, widow of T. M. Marshall, died, having been from the death of T. M. Marshall, in 1794, until her death, in the receipt of the rents and profits of Hukeleys and Prowses respectively.

14. Upon the death of Letitia Marshall, widow, in 1844, Peter Pasmore (who had long been in occupation of the tenements called Hukeleys and Prowses respectively as tenant to Letitia Marshall) continued in possession of the same until his death, in April, 1846, claiming to do so in his own right, as being entitled to the tenements for the life of John Monday under the several grants and admissions referred to in paragraphs 6 and 7. Peter Pasmore's claim to the tenements was, however, disputed by the Rev. John Daniel Lloyd, the then lord of the manor, and a claim by Peter Pasmore to surrender his alleged interest in the tenements in favour of John Monday was the subject of litigation between John Daniel Lloyd and Peter Pasmore at the time of the death of the latter.

15. On the death of Peter Pasmore, in April, 1846, the Rev. John Daniel Lloyd, then rector of Clare and lord of the manor of Manley, brought an action of ejectment against John Monday, who claimed to be entitled to possession of the tenements called Hukeleys and Prowses respectively under Peter Pasmore, and having recovered possession of the tenements respectively under the award of Mr. Serjeant Kinglake, to whom the action of ejectment was referred, John Daniel Lloyd, as lord of the manor of Manley, on or about the 19th of July, 1849, granted the tenements respectively, by separate admissions, to Nathaniel Hellings Lloyd, John Hellings Lloyd, and Thomas Hellings Lloyd, sons of John Daniel Lloyd, to hold the tenements to Nathaniel Hellings Lloyd, John Hellings Lloyd, and Thomas Hellings Lloyd for their lives and the life of the longest liver of them, under a certain yearly rent and an heriot, and by and under all other burthens, customs, and services therefor due and of right accustomed.

16. From 1849 until the 5th of July, 1873, when John Hellings Lloyd (who survived Nathaniel Hellings Lloyd and Thomas Hellings Lloyd), died, John Hellings Lloyd, Nathaniel Hellings Lloyd, and Thomas Hellings Lloyd, continued legal owners on the rolls of Hukeleys and Prowses respectively, under the two several grants mentioned in paragraph 15.

17. In 1858, the Rev. John Daniel Lloyd died, and thereupon the Rev. Henry Abraham Gilbert was duly presented and inducted to the rectory of the portion of Clare, in the parish of Tiverton, and thereby became lord of the manor of Manley.

18. In 1870, the Rev. Henry Abraham Gilbert died, and thereupon the Rev. Henry Venn (one of the defendants in this case) was duly presented and inducted to the rectory of the portion of Clare, and thereby became lord of the manor of Manley appendant to the rectory, and he appointed Charles Marshall Hole (the other defendant in this case) the steward of the manor.

19. John Monday, mentioned in the grant to Peter Pasmore in 1813, died in October, 1872, and thereupon the Rev. John Spurway (the prosecutor of this mandamus), who, as the grantee next in reversion to Peter Pasmore and John Monday, claimed the tenements for his own life under the grant of 1817, and for the life of William Spurway, his son, under the grant of 1826,

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tendered to Rev. Henry Venn, lord of the manor, and to Charles Marshall Hole, his steward, and required them to enrol a surrender of the tenements, offering at the same time to pay all customary fines, fees, and rents, and to do all acts necessary to entitle William Spurway to be admitted tenant of the tenements for the life of him, William Spurway. This surrender was accompanied by a tender of all customary fines, &c.

21. A surrender in the like form was tendered at the same time in respect of the tenement called Prowses, accompanied by a tender of all customary fines, &c.

22. The Rev. Henry Venn and Charles Marshall Hole refused to accept the surrender so tendered of the estate and interest of the Rev. John Spurway in the tenements to the use of William Spurway his son, and to admit William Spurway to the same, on the ground that the several grants in reversion to John Spurway in 1817 and 1826 (referred to in paragraphs 8, 9, and 10 of this case) became void as not having come into possession during the life of the Rev. William Spurway, the lord of the manor who granted them, and the next lord of the manor, John Daniel Lloyd, having (as is contended) avoided the reversionary grants to John Spurway by granting, in 1849, the two tenements to his sons as mentioned in paragraph 15.

23. All the court rolls and court books of the manor of Manley prior to 1872 have been lost, but the following is a copy of the customs of the manor presented at a Court there holden on the 25th September, 1699:—

"First, If any tenant die in possession, his best beast is due to the lord, and if any tenant die in reversion, being possessed of so much ground as will find a beast, and having also a beast of his own upon the same at his death, it is the lord's.

"Second, Our custom is, their wives to have their widows' estate.

"Third, Our rents are to be paid at two feasts of the year, viz. one half at Michaelmas and the other at the Annunciation of Our Lady.

"Fourth, Our custom is, at the change of a lord, to be returned by a penny.

"Fifth, If any man have taken a reversion, and the lord die that granted the same, and the said reversion being out of possession,

the next lord may lawfully set again. But the lord may grant three lives in reversion of a widow as if it were in hand, though not after any life named upon the copy without a surrender."

[Sixth, seventh, and eighth, referred to botes, &c.]

"Ninth, Our custom is, that but two lives in reversion are to be and to enjoy the same, either jointly or separately, as the grant or copy is made."

24. No instance is to be found on the court rolls now extant of an estate having been granted in any of the tenements of the manor to a tenant and his assigns, either during his own life or during the life of any other person, earlier than the reversionary grant made by the said Rev. William Spurway to Peter Pasmore as mentioned in paragraphs 6 and 7.

25. No instance prior to the grant by the Rev. John D. Lloyd, mentioned in paragraph 15, is to be found on the court rolls now extant of a reversionary estate in any of the tenements of the manor having been determined by the death of the lord who granted the same, or by the induction of a new lord to the rectory of the portion of Clare to which the said manor is appendant.

The question for the opinion of the Court is, whether, under the circumstances mentioned, the Rev. John Spurway is entitled to surrender his reversionary estate and interest of and in the tenements respectively called Hukeleys and Prowses to the use of his son William Spurway for his life, and to call upon the lord of the manor and his steward to accept such surrender, and to admit the said William Spurway accordingly.

Pinder, for the prosecutor. The question is, whether the defendant, the present lord of the manor, can avoid the grants of 1817 and 1826 by reason of the reversions not having come into possession during the life of the lord who granted them. If he cannot avoid those grants, the prosecutor is entitled to surrender his reversionary estate and to call upon the lord to accept the surrender. The question depends on the construction of the 5th custom, set out in paragraph 23. Its meaning is that if a lord of the manor, who had granted one reversion expectant upon a life estate in possession, died during the continuance of the life in possession, the next lord who succeeded him might add a further life in

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reversion to that which had been previously granted by the deceased lord. This construction of the 5th custom is entirely in accordance with the 9th custom, which allows two lives in reversion to be in existence at the same time, and is inserted amongst the customs for the purpose of obviating any doubt which might otherwise exist, as to whether the succeeding lord did not possess the same privilege of filling up the second life which the previous lord in his lifetime admittedly possessed. Any other construction than that now contended for, would render the 5th custom at variance with the general rule applicable to such a case, since it clearly appears by the authorities that the grant would be good, though the reversion did not fall into possession during the estate of the lord who made the grant: *Gay* v. *Kay* (1); *Clarke* v. *Pennifather* (2); *Reg.* v. *Strickland.* (3) The other side will contend that the construction of the 5th custom is that, if the lord who grants a reversion die, and the reversion has not come into possession, the new lord may lease again and avoid the reversion; such a construction would make the custom unreasonable, according to the definition of unreasonable customs given in Gilbert on Tenures, p. 325.

Fitzjames Stephen, Q.C. (*Forbes* with him), for the defendants. The defendants acted legally in refusing to accept the surrender of John Spurway and admit W. Spurway as tenant. The reversions under the grants of 1817 and 1826, not having come into possession during the life of the lord who granted them, became void. The customs of this manor are no doubt drawn in an inartificial manner. The last sentence in the 5th custom, "but the lord may grant three lives in reversion of a widow," has no meaning as it stands. The order in which the customs are drawn up should be re-arranged. The 9th, the 2nd, and the 5th, apply to the present case, and must be read thus: "Our custom is that but two lives in reversion are to be and to enjoy the same, either jointly or separately, as the grant or copy is made; our wives to have their widows' estate; but the lord may grant three lives in reversion of a widow, as if it were in hand; if any man have taken a reversion, and the lord die that granted the same, and the said reversion being out of possession, the next

(1) Cro. Eliz. 661. (2) 4 Rep. 23 b.
(3) 2 Q. B. 792.

lord may lawfully set again." The meaning is clear: the lord can grant one life in possession and two in reversion, either jointly or separately; the widow is to have her freebench; when a widow is in possession, the lord may grant three lives in reversion; but if the grants in reversion do not come into possession during the life of the lord who granted them, the next lord may lease again, and so avoid the reversionary grants. The general principle is that when the lord is a person with a temporary estate, he cannot make a grant beyond his own interest; and he cannot make a grant in reversion; he can only grant in reversion by virtue of a custom. In the present case such a custom exists, and the lord can grant in reversion so as to bind his successors, provided the reversion comes into possession during the existence of his interest; but the custom is that, if the lord who made the reversionary grant die before the reversion comes into possession, the next lord may lease again and avoid it. The custom must be taken as a whole; the grant must be in accordance with the custom as a whole; if the custom is unreasonable, as contended for on the other side, the whole custom is unreasonable and bad; and then it would follow that the reversionary grant to John Spurway is void, and under no circumstances would he be entitled to a peremptory mandamus.

Pinder was heard in reply.

MELLOR, J. If the lord of this manor can grant a reversion by virtue of the custom, he must stand upon the custom and the custom only. He must take the custom as a whole. If the meaning of the custom is that he is authorized to grant a reversion, which should take effect provided it falls in during his lifetime, then he has got a certain extension beyond what the common law principles would have given him; but when it comes to be contended that he is able by the custom to grant a reversion which is to be a binding reversion upon his successor, so as to reduce very much the value of the interest of the successor, I think it is just what Mr. Stephen says, that though he stands upon the custom, the custom does not warrant the conclusion that the grant of the reversion shall prevail against his successor, that is, that it does not enable a lord, whose interest is of a limited nature, to

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grant a reversion which shall come into possession after the limit of his own estate. It really does appear to me to come to that, and I think the construction contended for by Mr. Stephen is the right view of the custom. I think, therefore, the defendants are entitled to our judgment.

LUSH, J. I am of the same opinion. I confess I have not been able to entertain a doubt as to the true meaning of this custom. It can only mean that where there happens to be a reversion outstanding at the time of the death of the lord, the succeeding lord may treat the reversion as a nullity. The contention of Mr. Pinder is, that it means that if there happens to be one reversion only, whereas the custom authorizes two, it enables the successor to fill up that one. The custom is—and I think it is a reasonable custom—that if there happens to be a reversion outstanding at the time of the death of the lord of the manor, the succeeding lord may treat the reversion as a nullity, as if there were no reversion at all. I agree, therefore, that our judgment should be for the defendants.

QUAIN, J. I am of the same opinion. The question really resolves itself into the construction of the fifth custom. Now it is clear that the lord of a manor, having a temporary estate, may by special custom grant an interest in lands beyond his own interest, if the custom authorizes it, but by the custom the quantity of interest the lord can grant is fixed. The custom of a manor to grant in reversion may be qualified, and though lords having a limited interest in a manor can by custom grant in reversion, still it is a good qualification that the power of the lord over the reversionary estate should not survive him; and thus the power given by the custom is limited by the custom. The custom must be taken as a whole, that, though the lord for the time being may grant one life in possession, and two in reversion, if the reversions fall into possession during his life, yet the new lord may grant again, if those reversions do not come into possession during the life of the lord who granted them. That appears to me to be a fair and proper custom. I do not think Mr. Pinder has made out to our satisfaction that the custom should be construed

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as he suggests. Custom is the very life of a manor, and must be taken as a whole; the custom in the present case appears to me to be fair, convenient, and reasonable. I do not see what other construction can be put upon these words, and therefore I think the defendants are entitled to our judgment.

Judgment for the defendants.

Attorneys for prosecution: *Symes & Sons.*

Attorneys for defendants: *Irvin & Cock, for Dunsford & Hole, Tiverton.*

April 23.

BERGHEIM *v.* THE BLAENAVON IRON AND STEEL COMPANY, LIMITED.

Contract to deliver Goods to commence by the 15th of February, and to be completed by the 15th of May—Measure of Damages.

The defendants entered into the following contract:—Sold to the plaintiff 5000 tons of iron rails at 11*l.* 5*s.* per ton, delivered f. o. b., Newport, the delivery to commence by the 15th of January, and to be completed by the 15th of May. In the event of the defendants exceeding the time of delivery they shall pay by way of fine 7*s.* 6*d.* per ton per week. In the event of ships not being ready within fourteen days, notice being given, then payment to be made against wharf warrants for each 500 tons stacked and being to buyer's order. The defendants made default in the delivery of the iron, which was delivered during the months of May, June, July, August, and completed in September:—

Held, that the fine to be paid for delay in delivery ought to be calculated from the time at which the contract was to be completed, viz. the 15th of May.

CASE stated under judge's order after issue joined.

The action was brought to recover damages from the defendants for delay in delivering about 5500 tons of iron rails under a contract between the plaintiff as purchaser and the defendants as vendors, dated the 10th of December, 1872.

The plaintiff is a merchant in London, and the defendants are ironmasters carrying on business in Wales.

Towards the end of the year 1872 the plaintiff entered into a contract with a German company, called the Bergische Markische Railway Company, for the supply to them of a large quantity of iron rails, to be delivered, according to clause 11 of the contract, during the months of March, April, and May, 1873, in equal monthly quantities at Ruhrort or Deutz.

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The contract contained the following among other clauses:—

Clause 13: In the event of the date of delivery, as stipulated in clause 11, or the additional time allowed for extra deliveries being exceeded, the contractor has to pay a penalty for every week's delay of ten thalers for every 10,000 kilogrammes of rails not delivered in proper time or in accordance with contract.

The contractor is in delay if he has not fulfilled the arrangements undertaken by him for deliveries within the stipulated dates, and as soon as these latter have expired it shall not be necessary to prove such delay by legal or other proceedings. By accepting the delayed delivery without any reserve the royal direction does not lose the right to the penalty. Nor will the contractor by payment of the penalty be released from the delivery. On the contrary, the royal direction has the right, in consequence of the delay, not only to claim the penalty, but to demand besides the fulfilment either by the contractor himself of the engagements entered into by him, or to procure elsewhere, and at any price, and at his risk and expense, the whole or part of the quantity still awaiting to complete the delivery or to make good the part unsatisfactorily performed. Should the royal direction make use of this privilege, and after the delivery has been carried out elsewhere, and taking into consideration the value of the quantity delivered by the original contractor, and after allowing for all direct and indirect present and future damages and losses resulting from the delay, as well as the loss of profit, it will make out a bill of costs, and inform the contractor of the same, who will then have to reimburse the amount to the railway company.

During the time in which the plaintiff was negotiating with the German company, and after the conclusion of his contract with them, the plaintiff had frequent communications with James Wallis, the London manager of the defendants, as to their supplying him with the iron rails he would require. But there was no evidence that the plaintiff communicated to Wallis the terms of the German contract.

A discussion took place between the parties, amongst other things, as to whether a clause should be inserted in the contract exonerating the defendants from delivery at the time or times which might be agreed upon in case a strike should occur at

the works, and also as to whether the price per ton should be 10*l.* 17*s.* 6*d.*, without any guarantee of fair wear and tear of the rails, or 11*l.* 5*s.*, with a guarantee of fair wear and tear up to December, 1877.

On the 10th of December, 1872, Wallis wrote to the plaintiff as follows:—

"We have this day sold you about 5413 tons of iron rails to the appended section and specification, at the price of 11*l.* 5*s.* per ton, delivered f. o. b. Newport. Payment to be as stated in the specification.

"Specification. Quantity: Five thousand four hundred and thirteen tons, with option on buyers' part to make the quantity five thousand four hundred and fifty tons, on their giving notice three weeks before completion of contract. Delivery: The delivery of rails to commence by the 15 Jan. 1873, and to be completed by the 15 April, 1873. The makers to have the option to begin delivery on the 15th Dec. 1872. In the event of the makers exceeding the time for delivery above stipulated they shall pay by way of fine the sum of 7*s.* 6*d.* per ton per week, this amount to be deducted out of the payment for the rails. In exchange of B/L and engineer's certificate payment will be made by bills drawn at three months at an approved banking firm in London. In the event of ships not being ready within fourteen days, notice being given, then the payment by the same bills will be made against wharf warrants and engineer's certificate for each five hundred tons stacked and being to buyer's orders. The sellers undertaking to put f. o. b. when the vessel is ready. In the event of the makers being willing to commence delivery before the 15 Dec., they can do so, but in that case they will be paid under the same conditions by bills at four months instead of three."

The defendants guaranteed the rails to stand fair wear and tear up to December, 1877.

The 15th of May, 1873, was afterwards, by agreement between the parties, substituted for the 15th of April, 1873, and the time of delivery was thus extended.

On the 7th of January, 1873, the defendants wrote to the plaintiff: "We regret to inform you that our works, in common with

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our neighbours' in South Wales are at a complete standstill owing to the strike, and that it will be impossible for us to commence upon your contract as previously promised, viz. early in January. In fact, it is impossible to make any definite promise at present."

On the 7th of January, 1873, the plaintiff wrote to the defendants as follows: "I beg to call attention to the penalty which will be imposed upon you for non-delivery in strict accordance with contract. The then high price I paid you was under the stipulation that no strike clause should be inserted; and you are aware that I positively refused to make any allowance for strikes; and on that understanding the contract was signed. I shall, therefore, have to deduct 7*s.* 6*d.* per ton per week for all deliveries beyond the stipulated period."

On the 10th of January, 1873, Wallis wrote to the plaintiff: "It was distinctly understood at the time the contract was made, that you were liable to the railway company for specific delivery, and that you imposed the same dates of delivery upon us for your protection only, and that no claim was to be made unless they claimed the penalty from you. We asked you particularly to allow the strike clause to be inserted, and you said it was quite immaterial, as all contracts with the continental buyers were subject to force majeure. We therefore much regret that the tone of your note implies that you intend to take advantage of a misfortune which has happened not to Blaenavon only, but to all our neighbours."

On the 15th of February, 1873, the plaintiff wrote to the defendants: "I must remind you that delivery of the rails for which you have contracted should have commenced to day, and that as yet I have had no notice from you to send an inspector. I beg to suggest that it would be advisable for you to arrange for the immediate commencement of the rolling as the penalty under which you have contracted, unless you commence at once, amounts to a considerable sum, but which sum will nothing like compensate me for the damage which I shall sustain by your non-fulfilment of contract."

On the 8th of March, 1873, Wallis wrote to the plaintiff: "We have been quite unable to commence the rolling of the rails, and we fear that if the strike were to cease immediately we should

not be able to deliver the entire quantity by the 15th May. It was understood that we were to have the same benefit, as between you and ourselves, as was secured to you on your arrangement with the foreign railway company in case there should be any delay in the delivery. The suggestion you make as to a fine cannot, we conceive, be applicable to the circumstances of the present case, particularly as the rate of delivery has not been specified. It was never intended that we were to be punished for matters for which we were not responsible, nor for the non-delivery of the rails if circumstances rendered their delivery impossible. . . We also beg to suggest that you should have recourse to other sources of supply if you cannot wait for us."

On the 8th of March, 1873, the plaintiff replied as follows . . . "As I before stated I paid you an extra price, so that there should be no strike clause in the contract, as I wished to have the rails delivered without fail . . . I inform you that I shall require the contract to be carried out strictly to the letter . . . Delivery was to commence on the 15th of last month, and to be completed on the 15th May; the deliveries were to have been rateably over the short period of three months, and this you know to be the case."

On the 13th of March, 1873, Wallis wrote to the plaintiff: "You are wrong about the extra price; that was for the guarantee as to quality, and not as to delivery: neither can we accept your view as to the rate of delivering; but the important point is, that we are not to suffer loss in case of force majeure any more than you would have to do in your contract with the foreign government. . . ."

The defendants soon after recommenced rolling the rails; from various causes few, if any, were delivered until May, 1873.

On the 1st of May, 1873, the plaintiff wrote to the defendants: ". . . I must remind you of the serious penalties you have incurred and which you are daily increasing very largely, and I urge upon you to commence at once to have this contract completed, so as to diminish as far as possible the penalties which I shall be compelled to enforce, and I will only remind you that up to this date at least 4500 tons should have been delivered, whereas you have not delivered a single ton. I have made contracts for forwarding the rails, in order not to leave them for a day at your works,

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and I undertook to supply vessels with rails by the 7th of this month at latest, and I shall have to pay heavy damages for not doing so."

On the 7th of May, 1873, the plaintiff again wrote to the defendants, urging the delivery of the rails, and stating that the fines were already very serious.

On the 8th of May, 1873, Wallis wrote to the plaintiff, stating that the delay had arisen from the strike, and by the disorganized state of the furnaces in consequence of their inability to keep them supplied with the necessary material during a period of three months.

Delivery was made in parcels during the months of May, June, July, and August, 1873, and was completed in September. The rails were paid for from time to time in full by the plaintiff, but it was agreed between the plaintiff and defendants that the payments should be without prejudice to his claim under the contract for deductions for delay in delivery.

The plaintiff has been charged in account with the German company a considerable sum for delayed delivery.

The plaintiff made the final payment on account of the rails on the 15th of September, 1873, and immediately afterwards commenced this action.

The question for the opinion of the Court, who were to have power to draw inferences of fact, was whether the sum mentioned in the contract to be paid for delay in delivery should be calculated from the 15th of May, 1874, or from any other, and what time or times. (1)

Benjamin, Q.C., (*Cohen, Q.C.*, and *J. C. Mathew* with him), for the plaintiff, contended that the contract was for the delivery of iron rails in each month, commencing in January and ending in May, in parcels convenient for shipment, and that the defendants were in default from the dates at which such deliveries should have been made; and that the sum to be paid for a delay

(1) Two other questions were raised, but abandoned on the argument: 1. Whether the sum to be paid was a penalty or liquidated damages; and, 2. Whether evidence which had been offered as to the meaning of the phrase "per week" in the contract was admissible.

in the delivery should be calculated from the different dates in each month at which the delivery of a parcel of rails might reasonably have been expected by the plaintiff, or at which he would have been bound to accept delivery: *Roper* v. *Johnson* (1); *Brown* v. *Muller* (2); *Coddington* v. *Paleologo* (3); *Bloomer* v. *Bernstein.* (4)

Lopes, Q.C. (*Jeune* with him), for the defendants, contended that the contract shewed that the intention of the parties was, that the penalty for delay was to be calculated from a single date. The words were, "In the event of the makers exceeding the time of delivery;" that the defendants had till the 15th of May to complete the delivery, and it was from that date that the sum was to be calculated.

BLACKBURN, J. The question in this case is one of considerable difficulty, and I do not think that we can get any assistance from the authorities, because it depends entirely upon the construction of a particular written contract. The contract is: "We have this day sold to you about 5413 tons of iron rails to the appended section and specification, at the price of 11*l.* 5*s.* per ton, delivered free on board at Newport. Payment to be as stated in the specification." Now, if the contract stopped there, it would be clear that the defendants were to sell this quantity of iron rails, to be delivered free on board a ship at Newport. The iron would be sent there, and reasonable notice would be given to the plaintiff, so that he might prepare vessels for its reception. Then we have to refer to the specification to ascertain the price to be paid, and the mode of payment. And, then, as to the delivery, the specification provides: "The delivery of the rails to commence by the 15th of January, 1873, and to be completed by the 15th of April, 1873." By a subsequent agreement, May was substituted for May. And it was also agreed that the defendants, if they pleased, might begin to deliver on the 15th of December. And then the specification provides that: "In the event of ships not being ready within fourteen days, notice being given, then the payments by the same bills will be made against wharf warrants and engineer's certificate for each 500 tons stacked, and being to

(1) Law Rep. 8 C. P. 167.
(2) Law Rep. 7 Ex. 319.
(3) Law Rep. 2 Ex. 193.
(4) Law Rep. 9 C. P. 588.

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buyer's order. The sellers undertaking to put free on board when the vessel is ready." From this clause it would appear that in the event of the ships not being ready, the defendants are to stack the rails in quantities of 500 tons, and to be paid for them just as though they were on board ship. I am not prepared to say whether it is to be implied from the contract that the defendants should deliver the rails within reasonable times and in reasonable quantities. I think it is very probable that the plaintiff contemplated a rapid delivery, and inasmuch as the defendants had bound themselves to furnish the rails within certain specified times, he trusted that the defendants, for their own sake, would begin to deliver as quickly as they could, as otherwise they would be in extreme danger of being in default when the time came for delivery at the end of the term. It may be that the plaintiff thought the proper construction of the contract was that the rails were to be delivered within reasonable times and in reasonable quantities, and that there was a default as the time for the delivery of each reasonable quantity (probably 500 tons) went by. And he might contend that a default in delivery had been made if a reasonable quantity were not from time to time ready to be shipped at Newport. However, upon this I express no opinion. Assuming the contract was to deliver in a reasonable time and in reasonable quantities—and in that case the plaintiff would have to shew that a reasonable time had expired—at all events it is clear that the rails should all be delivered within the four months, that is to say, between the 15th of January and the 15th of May. Then the specification further provides: "In the event of the makers exceeding the time of delivery above stipulated, they shall pay, by way of fine, the sum of 7*s.* 6*d.* per ton per week." Now what does that clause mean? The parties may have intended to agree that in the event of there being any breach of the contract by the non-delivery of any of the iron specified in the contract at what may have been considered a reasonable time, then the penalty of 7*s.* 6*d.* per week per ton would run from the time when the rails might reasonably have been expected to have been delivered, and the penalty would have applied to each set of tons which from time to time might have remained undelivered. And then as to each of these tons of rails, reddendo singula singulis, the defendants would incur a penalty of 7*s.* 6*d.* per ton per week. But the

words of the contract are: "In the event of the makers exceeding the time of delivery above stipulated they shall pay." I think the meaning expressed by those words is that, if it is not all delivered within the four months—by the 15th of May—then, as to all that there may still remain to be delivered, this penalty will attach to each ton from the time when it should have been delivered, up to the time at which it actually was delivered. If the other construction were adopted, if it had been said that it was to be delivered at such time or times respectively, that would have raised a difficult question unless the reasonableness of the time for delivery had been defined: that, however, is not the contract here; if it were, then the question would have arisen, "What was a reasonable time?"—a very uncertain thing—and then we should have to decide as to the time from which the penalty should run on such a contract. It would have been very imprudent and unwise for the plaintiff to have made such a contract; but if the contract is, as I think it is, that all the rails that were not delivered at the end of the four months should be subject to the penalty, there is a fixed and certain time which the plaintiff has stipulated for in which the rails shall be delivered. I consequently answer this question in favour of the defendants, that the sum to be paid for delay in delivery should be calculated from the 15th of May, 1873.

MELLOR, J. I am of the same opinion. I think the question turns on the construction of the words, "In the event of the makers exceeding the time of delivery." What is the time of delivery? There is a day upon which the delivery is to commence, or may commence; and there is a day when it must end. Mr. Benjamin has failed to satisfy me that the rails were to have been delivered monthly or weekly, and therefore I have come to the conclusion, as the most reasonable construction of this contract, that the time for delivery is the period between the two specified times, and on no other day or time can I fix the time of delivery. Nobody would contend that the delivery was to be on the 15th of January. That would not be the time of delivery according to the contract. It must therefore be the entire time between the 15th of January and the 15th of May; and if after the 15th of May the contract is not performed, the defendants must

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pay 7*s.* 6*d.* per ton per week on the rails which are not delivered at that time.

FIELD, J. I am also of opinion that the sum to be paid for delay in delivering the rails is to be calculated from the 15th of May. The parties contract for the purchase and sale of a considerable quantity of iron rails to be delivered over some period of time, and they fix the period of time over which the deliveries were to take place. The deliveries are to be between the 15th of January for the commencement, and to the 15th of May for the completion of the contract; but the parties omit to specify by their contract in what proportion, whether monthly, weekly, daily, or otherwise, the rails are to be delivered. The contract merely mentions that the delivery is to commence on a given date and to be completed on another given date. I am inclined to think that if the question was only as to the manner in which that first clause should be construed, I should hold that the defendants were to commence by delivering a reasonable quantity, probably 500 tons, on the 15th of January, and to deliver the remainder rateably. But the question of what would be a fair rateable delivery would be a very difficult one to determine. Take the case of a man who agreed to deliver iron hoops as soon as possible. Suppose his works were in a bad state, and there were other unavoidable things standing in his way; inasmuch as the contract was to deliver the hoops as soon as possible, all those circumstances are to be taken into account in considering whether the contract had been fairly and reasonably performed. In this contract a specified time is mentioned for the delivery of the whole of the rails, so that the question of reasonable time does not arise. If we had to consider this contract without the subsequent clause, in what mode would the damages have been calculated? Are they to be calculated from day to day, from week to week, or from month to month, at the varying prices of iron, which we know varied much during that period? The parties, to avoid this difficult question, have expressly stipulated, in the event of the makers exceeding the time for delivery, they shall pay a certain sum. I must say the word "time" in the singular is of some consequence, because, if the language had been "exceeding the times for delivery," I might have come to a different conclusion; but I think that the time for delivery means

that the delivery was to be concluded on the 15th of May. I think, therefore, the damages will have to be calculated from the 15th of May.

Judgment accordingly.

Attorneys for plaintiff: *Hollams, Son, & Coward.*

Attorneys for defendants: *Norton, Rose, Norton, & Brewer.*

GIBSON, APPELLANT; BARTON, RESPONDENT.

April 24.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 27, *and* 49—*List of Members to be sent to Registrar—Manager de facto when liable to Penalty under s.* 27—"*Year*" *in s.* 49 *Calendar Year.*

By s. 49 of the Companies Act, 1862 (25 & 26 Vict. c. 89), a general meeting of every company under this Act shall be held once at least in every year:—

Held, that the word "year" means the period of time commencing on the 1st of January and ending on the 31st of December, and not the period of twelve months commencing from the day of registration of a company.

By s. 26: "Every company . . . shall make once at least in every year a list of all persons who on the fourteenth day succeeding the day on which the ordinary general meeting . . . is held are members of the company . . . and a copy shall forthwith be forwarded to the registrar of joint stock companies." By s. 27 "if any company . . . makes default in complying with the provisions of the Act with respect to forwarding such list such company shall incur a penalty . . . and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur a like penalty."

The appellant was the secretary of a company registered under the Companies Act, 1862. The articles of association did not provide for the appointment of a manager, and none had been appointed. At a meeting of directors in 1872, the appellant reported that he had called a general meeting of the shareholders; and in 1874 he had, in a letter to the directors, stated that unless certain contracts were carried out he should feel it his duty to summon a general meeting of shareholders. No ordinary general meeting of shareholders had been held in the year 1873, and no list of shareholders had been forwarded to the registrar in compliance with s. 26, and the appellant had not taken any steps to cause a meeting to be held in 1873. He was convicted on an information charging him, as manager, with authorizing a default in forwarding a copy of the list of shareholders to the registrar in 1873:—

Held, by Blackburn and Lush, JJ. (Quain, J., dissenting), that the conviction ought to be affirmed: for that there was evidence that the appellant was manager de facto, and therefore a manager within s. 26; and as he took no steps in 1873 to call a meeting, and thereby made it impossible for him to forward to the registrar a list of the members, there was evidence that he had knowingly and wilfully authorized a default within s. 27.

CASE stated by the Lord Mayor of London under 20 & 21 Vict. c. 43.

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An information was preferred on the 16th of March, 1874, by the respondent, a member of the Steam Stoker Company, Limited, against the company, for that it being a company under the Companies Act, 1862 (25 & 26 Vict. c. 39), having a capital divided into shares, did not forward to the registrar of joint stock companies a copy of the list of persons who, on the fourteenth day after the holding of the ordinary general meeting of the company, were members of the company, as required by s. 26 (1) of the Act, and that the default continued for seventy-four days, contrary to s. 27 of the same Act; and also against five directors of the company and the appellant, W. Gibson, as the manager, for that they unlawfully, knowingly, and wilfully authorized and permitted such default.

The articles of association of the company were put in evidence; and the following clauses were referred to in the argument and judgments:—

General Meetings, clause 38.—A general meeting shall be held once in every year at such time and place as the directors may from time to time determine.

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(1) By 25 & 26 Vict. c. 89, s. 26: "Every company under this Act, and having a capital divided into shares, shall make once at least in every year a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings, is held, are the members of the company; and such lists shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars: 1. The amount of the capital of the company, and the number of the shares into which it is divided. 2. The number of shares taken from the commencement of the company up to the date of the summary. 3. The amount of calls made on each share. 4. The total amount of calls received. 5. The total amount of calls unpaid. 6. The total amount of shares forfeited. 7. The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them. The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day, as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies."

By s. 27: "If any company under this Act, and having a capital divided into shares, make default in complying with the provisions of this Act, with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur a like penalty."

Clause 40.—The directors may, whenever they think fit, and they shall, upon a requisition made in writing by members of the company holding in the aggregate shares or stock to the nominal amount of one-fifth of the capital of the company, convene a special general meeting.

Powers of Directors, clause 74.—The business of the company shall be managed by the directors. . . .

Actions and Suits, clause 83.—William Gibson, of No. 1, Wellington Square, King's Road, London, shall, if the directors approve, be the secretary of the company at such salary either fixed or based upon a percentage upon the profits of the company, or partly one and partly the other, as the directors may think fit.

Clause 84.—The directors shall have power to appoint and remove the secretary, solicitors, bankers, and other officers of the company.

Managing Directors, clause 90.—The directors may appoint one or more of their number to be managing, travelling, or local director. . . .

It was proved that the memorandum of association of the company was registered on the 31st of July, 1872; that a meeting was held within four months of such registration, in compliance with s. 39 of the Companies Act, 1867 (1); and that a list of shareholders up to the 27th of November, 1872, was forwarded to the registrar of joint stock companies on the 20th of December, 1872, according to which list 175 shares had been taken up to that time; that no other general meeting had been held, and that no other list of shareholders had been forwarded until the 19th of March, 1874 (three days after the information had been laid), when a list was forwarded purporting to be made up to the 27th of November, 1873, according to which list 1252 shares had been taken up, and 4250 shares, fully paid up, had been allotted to the vendor of a patent acquired by the company. It was also proved that the appellant had before the formation of the company entered into several contracts to enable the company to acquire patents to carry out its objects, and that he was a contracting party on behalf of the company to a subsequent agreement, dated the 9th of December, 1872.

(1) By 30 & 31 Vict. c. 131, s. 39: "Every company formed under the principal Act after the commencement of this Act shall hold a general meeting within four months after its memorandum of association is registered; and if such meeting is not held the company shall be liable to a penalty not exceeding five pounds a day for every day after the expiration of such four months until the meeting is held; and every director or manager of the company, and every subscriber of the memorandum of association who knowingly authorizes or permits such default shall be liable to the same penalty."

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The directors' minute-book was put in evidence under s. 67 of the Companies Act, 1862, by which it appeared that there was no other manager of the company than the appellant, but that he was described as a "secretary," and in which book were, among other minutes, the following entries:—

"At a meeting of the directors of the Steam Stoker Company, Limited, held on the 9th of December, 1872, the secretary reported that in order to comply with the requirements of the Joint Stock Companies Act, he had called a general meeting of the shareholders, consisting of the seven signatories to the articles of association, and submitted the minutes of the meetings.

"The Steam Stoker Company, Limited.

"155, Fenchurch Street, Jan. 13, 1874.

"Gentlemen,—I have already from time to time verbally protested against the Salford contract, foreseeing the danger of its being lost, but now that such danger has become imminent, I feel I should be wanting in my duty towards the shareholders if I did not put my protest formally and in writing, which I hereby do. You will remember from the very commencement of the company's operations I have always contended that it only needed a little attention to secure this very contract, but I have always been met with a reply that nothing could be done in that quarter until the Chartered, or latterly, the Imperial Company, had approved the machines; and it was in spite of these opinions that, at my own expense in the first instance at any rate, I went to Salford and secured this contract, upon which only, in my opinion, does the success of the company mainly depend. It is now ten weeks since the contract has been secured, and we have apparently retrograded instead of progressed. I am quite certain that not one of the directors nor shareholders of this company would pursue a similar course in their own business; it certainly is very unusual to throw every obstacle in the way of receiving a clear profit of 1500*l.* to 2000*l.* a year; on the contrary, the recipient of such an income would naturally smooth the way, and not raise difficulties. Your solicitor tells me that in equity the contract would be good without the seal of the corporation, but that in case of dispute it might be necessary to file a bill in Chancery to enforce it. What risk can

the company incur under such circumstances? If the machines are a failure, the corporation have nothing to pay; if, on the other hand, as I fully anticipate, they are a success, the corporation will only be too glad to carry out the contract, into which they have now entered with a full knowledge of all the facts, and evidently for the purpose of carrying it through in good faith. I repeat I am anxious to be relieved from my present position, and desirous to remain only so long as may be necessary to complete this contract, and that with the Imperial; and unless these are carried out in a business shape I shall feel it my duty to summon a general meeting of the shareholders (which ought now to be held), and to lay before them the whole facts of the case. As regards my claim, so satisfied am I as to my rights, that I am perfectly willing to leave it to arbitration, or, for the sake of prompt settlement, would be willing to compromise it in the manner suggested to your chairman some time ago; but it is not right that the shareholders' interests should be injured in the way they now are by the course the directors are now pursuing.

"W. Gibson.

"To the chairman and directors of the
Steam Stoker Company, Limited."

6. In addition to the minute-book above referred to, it was sworn by the respondent that he knew the appellant as the "manager" of the company, and transacted business with him as such, but that he corresponded with him as the secretary; and, lastly, it was proved that no other person had been appointed to be manager or managing director of the company.

7. On the part of the appellant it was contended: 1. That the appellant was not the manager, and as the secretary he was not liable. 2. That the statute required the list to consist of those persons who, on the fourteenth day succeeding the ordinary general meeting, were members of the company, and that there being no such meeting no such list could be made up, and therefore that the then defendants could not be punished for not sending a list which could not be sent. 3. That the appellant had been prematurely summoned, because the company having been registered on the 31st of July, 1872, and having held one general meeting in November of that year, in compliance with the statute, the year

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would terminate on the 31st of July, 1873, from which day the company were allowed by statute one year in which to hold their ordinary general meeting, which would thus allow them until the 31st of July, 1874, for the holding such meeting.

The Lord Mayor decided as a fact that the appellant was the manager of the company. 2. That, as no list had been sent to the registrar in the year 1873, the company was in default on the 1st of January, 1874, and on each succeeding day, excluding Sundays. 3. That the appellant had not been summoned prematurely.

The questions for the Court were—1. Whether there was evidence on which to find as a fact that the appellant was the manager of the company. 2. Whether, as the company had not held any general meeting since November, 1872, the appellant as such manager could wilfully authorize the company's default in not forwarding, during the year 1873, the list required by s. 26 of the Companies Act, 1862. 3. And whether the appellant was summoned prematurely.

H. Matthews, Q.C. (*Warton* with him), for the appellant. The conviction is wrong. First, the appellant is not the manager, but the secretary of the company. In ss. 27, 32, 34, and 45, of the Act of 1862 (25 & 26 Vict. c. 89), the words are "directors and managers," in the conjunctive. "Manager" means a person to whom the directors have legally delegated their powers. By s. 43, which regulates the register of mortgagees, a penalty is imposed on every officer of the company who refuses an inspection of the register. The Act draws a distinction between the officers and the directors and managers of a company. By s. 15, if the memorandum of association is not accompanied by articles of association, the regulations contained in the first schedule, table A, shall be deemed to be the regulations of the company. In the present case there are articles of association regulating the business of the company. By clause 74 of those articles, the business of the company is to be managed by the directors, and by clause 84 the directors have power to appoint and remove the secretary, solicitor, and other officers of the company; by clause 90 they may appoint one or more of their number to be managing, travelling, or local directors. Neither 25 & 26 Vict. c. 89, nor 30 & 31 Vict. c. 131, empowers

the directors to delegate their powers to a manager, and the articles of association only permit the directors to appoint one of their own body as a managing director. Not only is there no authority to appoint a manager, but the directors have not appointed one. Secondly, under 25 & 26 Vict. c. 89, s. 26, a list of shareholders cannot be sent into the registrar's office until fourteen days after the general meeting has been held. No general meeting has been held, and there is no default by the appellant. He is not responsible that no meeting has been held, for he had no power to call a meeting. By clause 38 of the articles of association, a general meeting shall be held once in every year, at such time and place as the directors may from time to time determine; and by clause 40 the directors may, whenever they think fit, and they shall, upon a requisition in writing by members of the company, convene a special general meeting. So that by clause 38, by implication, and by clause 40, by express regulation, the only persons who can call a general or a special general meeting, are the directors. Thirdly, the appellant has been prematurely summoned. By s. 49 of the Act of 1862, a general meeting of every company under this Act shall be held once at the least in every year. The year dates from the registration of the company. The company was registered on the 31st of July, 1872; a list of shareholders was forwarded on the 20th of December, 1872. The year of registration would end on the 31st of July, 1873, so that the company would have until the 31st of July, 1874, to send in the list; but the information was laid on the 16th of March, 1874.

Metcalfe, Q.C., for the respondent. First, the appellant was acting as the agent of the directors; he is a manager de facto. There was no other person who managed the affairs of the company. Secondly, he appears on the facts stated in the case to be a person who assumed to have the power to call a meeting of the company; he cannot by not calling a meeting absolve himself from the duty incumbent on him to send a list of shareholders to the registrar. [He was stopped on the third point.]

H. Matthews, Q.C., was heard in reply.

BLACKBURN, J. The case raises three questions. I regret that

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we differ on the first two; on the last we are unanimous, and I will dispose of it first. Sect. 26 requires that every company shall make, "once at least in every year," a list of persons who are members of the company, and forward the list to the registrar of joint stock companies. I have no doubt that "year" in that section means a calendar year; and as no list was made out and forwarded as directed for the year 1873, the company was in default. I do not think that the fact that the company was constituted and registered on the 31st of July, 1872, makes the year relate to that day as the commencement of the year. The year is the period of time between the 1st of January and the 31st of December, both days inclusive.

The first question raised is, whether there was evidence on which we could find, as a fact, that the appellant was "manager" of the company. That involves two things: whether there was evidence that the appellant was a manager in any sense, and whether the sense in which he is shewn to be a manager is a sense that would make him liable to the penalty under s. 27. I am of opinion that in both respects the Lord Mayor was right, and the judgment should be affirmed. Sect. 27 enacts, if the company makes default, and does not forward a list of members, the company shall incur a penalty, "and every director and manager of the company who shall knowingly and wilfully authorize or permit such default, shall incur the like penalty." In what sense are the words "director" and "manager" used in that section? When the section says "director," it is plain enough a director is a director, but the words are "and manager." We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole of the affairs of the company. The Act of Parliament gives no definition of manager. In the first schedule to the Act, table A (which by s. 15 is to come into force unless provided otherwise) does, by paragraph 55, say that "the business of the company shall be managed by the directors," and, taking those words by themselves, the directors are the persons who are to manage the business of the company, and are the managers, in that sense, of the company. It is not neces-

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sary to decide it, but if a board of directors were to delegate the whole power of management to a particular individual, and say, "This person, not being one of our body, shall manage all the business of the company," and that person then made a contract, I am inclined to think that any shareholder who had not assented to the appointment might say, "I will not be bound by the act of the person appointed by the directors; for although I agreed that the directors should manage for me, delegatus non potest delegare, I never authorized them to delegate any authority to a manager, and consequently I am not bound by the act of that manager, and the board of directors cannot ratify his act, because it was a thing wrong from the first." I say I am inclined to think so, but it is by no means necessary to decide it. I think certainly, until the House of Lords reverse the decision in the case of *Riche* v. *Ashbury Railway Carriage Co.* (1), that if all the shareholders were to agree to ratify the act, it would bind the company; but, in the absence of such ratification, the person appointed by the directors, though he would be a manager in a sense, would not have authority to bind the company. But if the articles of agreement contained a clause, that the business of the company should be managed by the directors, and the board of directors should have power to appoint a salaried general manager, not one of their body, who should manage the whole affairs of the company, subject to the directors having a control, then that person being expressly authorized to act, would be a manager. I cannot doubt that if under such a clause a person were named as manager, he would be a manager within the meaning of s. 27. He would come within the words "every director and manager of the company." In the present case the appellant is not a manager appointed in that way. The evidence comes to no more than this, that he was permitted by the board of directors to manage the company generally, just as if he had been legally appointed by them to act as manager. I think there is evidence that the appellant took upon himself to act, and did act just as if he was such manager. The question, therefore, is, whether a person who is thus a

(1) Law Rep. 9 Ex. 224. The decision was reversed in the House of Lords, 9 June, 1875; see W. N., 1875, p. 123.

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manager de son tort,—a manager in his own wrong,—whether he can protect himself from the liability cast upon a manager under s. 27, by saying, "I am not manager de jure." I think he cannot. There are many instances in which a person who de facto exercises an office cannot defend himself by saying, when he is called upon to bear liability in consequence of his wrong, "I am not rightfully in the office, there is another man who may turn me out." An executor de son tort is an instance in which a man incurs all the liabilities of an executor as to third persons, and he is not permitted to say, "I am not executor; there is another man who may take out probate." The answer is, "Your liability as to a third person rests upon your being executor de son tort; you have usurped the office and must bear the liabilities." So, if there was a disseisor in old times who turned out the rightful owner of the land and became freeholder by wrong, he could not, if he was indicted ratione tenuræ for not repairing a bridge or not cleansing a harbour, say, "Though I am in actual possession of the property I will prove that I am only a usurper; that the rightful heir, who is supposed to be dead, is alive, and I set up that as a defence, and say I am not a freeholder in law." The answer would be at once, "You are freeholder in your own wrong, and you must incur the liabilities so long as you are freeholder." So, if a director were to set up in answer to a penalty under s. 27, that he was not a director, that he was illegally elected, the answer would be, "You have acted as director, and were a director in your own wrong." I think there was evidence to justify the Lord Mayor in drawing the conclusion that the appellant was de facto manager. No doubt the appellant is called secretary, but was he a person to whom the whole management had been delegated, probably improperly delegated, by the board of directors, and who had taken upon himself to act as sole manager? He himself says in the minutes, "The secretary," that is himself, "reported that, in order to comply with the requirement of the Joint Stock Companies Acts he had called a general meeting of the shareholders," &c. . . . That is evidence upon which the Lord Mayor might find that he had taken on himself the management of the company; he has of his own authority done an act which was to be done only by the

directors. So, again, in the letter he tells the directors he will call a meeting. I do not say he had power to call a meeting. I think he had not, but I think that is evidence that he had assumed to act for the directors, and had taken the management of the company on himself. The Lord Mayor rightly drew the inference that the appellant was, by his own wrong, manager of the company.

The second question is this: by s. 26 the company "shall make once at least in every year" (which we have already held means every calendar year) "a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting is held, are members of the company." In point of fact the company never did, during the calendar year 1873, hold any meeting, therefore they never could make out a list of the persons who were, on the fourteenth day after that meeting, the members of the company: for that fourteenth day never came, because of the default of the company in not holding the meeting. And I take it to be quite clear that the company were bound to perform the condition precedent in order that they might perform their duty. Then s. 27 says, "And every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty." Now, no individual director, nor a manager, probably, has the power, certainly no one of them has the strict legal right, to call a meeting. A meeting is to be called by order of the directors, and not by any individual person; but cannot a director or a manager be guilty of wilfully authorizing or permitting a default by the company? I think that he can. I think it is a question of fact whether they have or not; but I think if a man is allowed to manage the company, so that de facto he can get a meeting called when he likes, and he does not shew that he ever made the attempt to call a meeting, it is some evidence that he has knowingly and wilfully (that is the question of fact for the justices) permitted default in calling the meeting, the meeting being necessary as a condition precedent before a list of members could be sent. I am fortified in my opinion by s. 39 of 30 & 31 Vict. c. 131. The words of that section are: "Every director and manager of the

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company, and every subscriber of the memorandum of association, who knowingly authorizes or permits such default shall be liable to the same penalty." The legislature evidently thought that a subscriber to the memorandum of association who, not being either a director or a manager, could not himself call a meeting, might nevertheless be guilty of knowingly authorizing and permitting a default in calling a meeting. This enactment throws some light on the meaning of the words of s. 27 in the earlier Act, where we find the same words. I think the manager, though he cannot himself convene the meeting of the company, can himself wilfully and knowingly permit default by not causing the company to call a meeting, and if he knowingly and wilfully permits the company to make a default in what is a condition precedent to sending in the list, I think he knowingly and wilfully permits the default of not sending in the list, and makes himself liable to the penalty for not sending in the list.

I think, therefore, that the conviction ought to be affirmed.

LUSH, J. I am of the same opinion. On the third point, I think, with respect to the words that "general meetings shall be held once in every year," the words "every year" must mean every calendar year; and I think that is supported by a reference to the articles of association in the first schedule of the Act. Clause 29 says: "The first general meeting shall be held at such time, not being more than six months after the registration of the company, and at such place as the directors may determine." I think that by implication gives the company six months, whether that period happens to be within the same year as the registration or not, to hold their first general meeting. And then comes clause 30, which says, "Subsequent general meetings shall be held at such time or place as may be prescribed by the company in general meeting; and if no other time or place is prescribed a general meeting shall be held on the first Monday in February in every year." Therefore the construction of the statute is perfectly plain. In the first calendar year of the registration of a company they are not bound to hold a general meeting if there are not six months in that year. New companies have four months by the

provision of the latter statute (30 & 31 Vict. c. 131, s. 39) in which to hold the first general meeting. But all subsequent meetings are to be held once in every calendar year, at a time to be appointed by the company, and if the company do not appoint any other time, then they shall be held on the first Monday in February in every year.

As to the next question, the one on which we unfortunately differ, I agree with my Brother Blackburn, that there was evidence on which the Lord Mayor might well come to the conclusion that the appellant did act as the manager of the company. My Brother Blackburn has referred to the minutes of the meeting, in which the appellant, without having pretended to have any authority from the directors, called the first general meeting of the shareholders. In the letter of the 13th of January, 1874, in which he complains of the directors not having gone on according to his view in the purchase of the contracts and patents, he says: "I am anxious to be relieved from my present position, and desirous to remain only so long as may be necessary to complete this contract (that with the Imperial), and unless these are carried out in a business shape I shall feel it my duty to summon a general meeting of the shareholders." How could there have been any duty in him, or how could he have had the power to call a general meeting of the shareholders, except in the capacity of a person acting as manager of the company? I think, therefore, there was evidence upon which the Lord Mayor might well come to the conclusion that he was manager of the company. Then is he a "manager" within s. 27? I think he is, and that "manager" in that section must mean manager de facto. I do not think that it is competent for him to say, "True, I acted as manager of the company; but yet, not being manager de jure, I can evade the liability imposed as between the public and the company by s. 26. The appellant is fulfilling the duties of manager of the company, and is the person to whom the statute looks for the fulfilment of the obligations imposed under s. 26.

Then comes the other question, is there evidence to justify the Lord Mayor in coming to the conclusion that, being manager, the appellant knowingly and wilfully authorized and permitted the com-

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pany to make default in holding the general meeting in the year 1873? That is an inference of fact. There is nothing stated in the case to shew that he made any efforts to get up a meeting to call the directors together, or that he took any steps in order to enable them to hold a general meeting. The holding of the general meeting being a condition precedent to the ability to make out the list, those who knowingly and wilfully authorized a default in holding that general meeting must be guilty of default in not preparing that list, for without a general meeting had been held the list could not be made out. Now, if the appellant had shewn that he had summoned the directors and taken reasonable steps to enable them to hold the meeting, then he might not have become liable under s. 27; but there is nothing of that kind shewn, and I think the inference is a very reasonable one, that the omission to hold that general meeting in the year 1873, which, according to our view, the company ought to have held, was an omission with his sanction. He is therefore guilty, and liable to the penalty for having knowingly and wilfully authorized that default.

QUAIN, J. I am of the same opinion as the other members of the Court as to the third question, but I regret that I cannot agree with the majority of the Court on either the first or the second. In my opinion the appellant is entitled to judgment on both those questions. The penalty is, by the express terms of s. 27, imposed upon "every director and manager of the company." In my opinion the appellant is neither a director nor manager of the company within the meaning of that section. I think that "manager" means a statutable manager, a manager appointed by virtue of the Act of Parliament and the articles of association; and, in a penal statute like this, we must so confine it, and impose the penalty only on a person who fills that character. I am of that opinion because I find, by s. 45, that the company "shall keep at its registered office a register containing the names and addresses and the occupations of the directors or managers, and shall send to the registrar of joint stock companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in any such directors or

managers." It is clear, therefore, the statute contemplates the appointment of managers, and contemplates that their names shall be sent in to the registrar, shewing therefore that the statute, where the articles of association permit it, contemplated the appointment of certain officers called managers, who occupy a statutable position and whose names must be sent to the office of the registrar in the same manner as the names of the directors are sent. I am of opinion that such a person is the manager who incurs the penalty under s. 27, and not a person who acts as an agent or as a manager de facto. Where there are no managers, by article 55 in table A of the Act of 1862, it is expressly provided that the business of the company shall be managed by the directors. The directors are therefore the only persons who are managers, and the only persons that can be made liable to the penalty in s. 27, because they are made liable as directors; and they may be liable in their double capacity of directors and managers, and in the present case by the express terms of clause 74 of the articles (which is a copy of article 55 in table A); the business of the company is to be managed by the directors. Therefore where there are no managers appointed under either statute or articles, the directors are the only managers contemplated in this Act of Parliament. If the articles contained a power which enabled the directors to appoint a manager or managers, no doubt they might do so, and then the manager so appointed, by virtue of the statute and the articles made in pursuance of the statute, would undoubtedly be the manager within the Act of Parliament; but here there is no power to appoint any such officer, and there is no officer attached to the company, or authorized by the articles to act as a manager of the company. Therefore I think the appellant is not a "manager" within the meaning of the Act of Parliament, and merely acting as manager de facto is not sufficient, because, if he is manager de facto he is not the manager in the statutable sense: he is the mere agent of the directors. The directors are responsible for his act, and the directors are liable to the penalty. There is no evasion of the Act of Parliament, because the directors are the parties responsible; therefore I do not agree with the observation that if we hold the manager de facto is not responsible, you would

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allow him to evade the Act of Parliament. I do not see any force in that argument, because he is merely acting as the agent or servant of the directors; and the directors are the parties responsible for not sending the list. Therefore, on the first point, I hold that the appellant is not the manager within the meaning of s. 27, and liable to this penalty. I am further of opinion that there is no sufficient evidence on the face of these proceedings to make the appellant liable as manager de facto. The word "manager," it is admitted on all hands, will not apply to a man who acts once or twice, but he must be a delegate having the control of all the affairs of the company. I do not find any evidence that these directors have delegated their affairs to any person. The fact that the appellant, being a promoter, writes that he will call a meeting of the company and professes to enter into contracts for the company in the hope that the directors will acknowledge and ratify those contracts, does not make him in any sense the universal delegate of all their affairs, or manager de facto. It seems to me, therefore, that there is no evidence that the appellant was a manager de facto; he is the secretary, a mere servant of the company, and I do not think, in construing a penal Act, we ought to transform him into manager.

The second point is, I think, still stronger in favour of the appellant. It is admitted on all hands that the list could not be sent in unless a general meeting had been called, because the list is to be sent in on the fourteenth day after the general meeting. Then it is said that the appellant, as general manager, is liable for not calling the meeting. Now, in the first place, who is to call the meeting? The appellant has no legal power to call the meeting. By the articles of association of this company the meetings must be called by the directors; clause 38 expressly says a general meeting shall be held at such time and place as the directors shall determine. The appellant has no power to compel the directors to appoint either time or place, and therefore I fail to see how the appellant can be responsible for not calling the meeting. The responsibility is sought to be put upon him because he said in that letter, "I will call a general meeting," which he had no power to call. He is sought to be made

responsible for the default of not calling a general meeting when he has no power to call a meeting, which has to be called by the directors, and he had no control over them. How it can be said that the appellant authorized the default in not calling a meeting, which he had no authority to call, and which was to be called by the directors, I fail to comprehend.

On these grounds I think that the conviction ought to be quashed.

Judgment for the respondent.

Attorney for appellant: *Henry Philips.*
Attorneys for respondent: *Lewis & Lewis.*

END OF EASTER TERM, 1875.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXVIII VICTORIA.

1875
June 17.

THE COMMERCIAL STEAMSHIP COMPANY *v.* BOULTON AND ANOTHER.

Ship and Shipping—Construction of Charterparty—Lay Days; running or working Days—Demurrage—Fraction of a Day.

Under a charterparty from Riga to London the charterers were to "load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said lying days at 25*l.* per day."

Held, that the lying days from the context meant "working" and not "running" days, and consequently that Sunday was not to be counted:—

The ship got into dock in London on a Tuesday evening at 5 p.m. She could not get to her berth till 8 a.m. on the Wednesday, when she began unloading, and continued till 8 p.m. She began again at 4 a.m. on Thursday, and finished at 8 a.m. All the lay days had been consumed at the port of loading:—

Held, that in the case of demurrage a fraction of a day counted as a day, and consequently that the charterers were liable for two days demurrage.

DECLARATION for demurrage under a charterparty of the steamship *Brighton*.

Pleas, inter alia, payment, and payment into court.

At the trial before Pollock, B., at the Newcastle spring assizes, 1875, it appeared that the defendants chartered the plaintiffs' steamship *Brighton* on a voyage from Bolderna or Muhlgenban, near Riga, to London, for a cargo of sleepers. "Freight to be

paid in cash, loading and discharging the ship as fast as the steamer can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said lying days, at 25*l.* per day."

The jury returned a verdict for 50*l.*, or for two days demurrage, beyond the sum paid into court, leave being reserved to move to enter the verdict for the defendants, or to reduce the damages, the Court to be at liberty to draw inferences of fact.

The facts as to the points reserved were these: First, if the lying days to be allowed under the charterparty were "running" days, then a Sunday would have to be counted as one of the days, and the ship would have been one day on demurrage at the port of loading; if "working" days were meant, then the lying days only were exhausted at the port of loading: and the question arose whether the plaintiffs were entitled on the facts to two days' demurrage in London. As to this, the facts were that the ship, when in the Thames, was directed to proceed to the Victoria Docks. She got into the docks on the evening of a Tuesday at 5 p.m., but, owing to timber of the defendants being in the way, she did not get to her berth till 8 a.m. on the Wednesday. She began discharging at that hour, and continued to discharge till 8 p.m., when the labourers knocked off work. She began again at 4 a.m. on the Thursday, and finished at 8 a.m.

A rule was obtained, pursuant to the leave reserved, to enter a verdict for defendants or to reduce the damages.

Herschell, Q.C., and *Crompton*, shewed cause. First, the lying days in the charter mean running days. This is the general meaning unless working days be expressly named: *Brown* v. *Johnson*. (1)

[LUSH, J. Reading the whole clause together, "loading and discharging as fast as the steamer can work, but a minimum of seven days to be allowed merchants," the lying days must mean working days.]

Then arises the second point, whether the plaintiffs are entitled to charge two days on demurrage in London. Demurrage begins to run from the time the ship is in dock, and not from the time she gets to a berth: this was decided as to lay days in *Brown* v.

(1) 10 M. & W. 331.

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Johnson (1) and *Tapscott* v. *Balfour*. (2) The demurrage days therefore began to run on the morning of Wednesday, and it was the defendants' loss if she was not able to begin discharging before 8 a.m. Then as to the second day, Thursday, a portion of a day must be counted as a whole day in the case of demurrage: and it is frequently the practice in the charters of large steamers to reckon demurrage by the hour, so as to avoid the great expense of counting by days. There is no case to be found on the subject, but it is clear that, on the score of convenience, if the ship is detained any part of a day it must be at the charterer's expense. She may lose a tide by being detained however short a time.

Aspinall, Q.C., and *Bruce*, in support of the rule. The Court has already intimated its opinion on the construction of the charterparty, that the seven days mean working, and not mere running days. As to the other point: the time occupied by discharging was only one full day. Why should the expense of the delay fall on the charterer? The absence of any cases on the subject is in the defendants' favour. At all events, they are only bound to pay for a portion of the second day.

MELLOR, J. I am of opinion that the rule should be discharged. The stipulation is that the loading and discharging should be as fast as the steamer can work, although a minimum of seven days is allowed to the merchants; and they are bound either to discharge within this minimum or pay demurrage for each day beyond. It is said the defendants are not bound to pay for the second day, or at all events only for a portion of it. But they detained the vessel over the first day, and consequently must pay for the second day. Any other rule would be attended with great inconvenience.

LUSH, J. I am of the same opinion. The clause in the charterparty, "loading and discharging the ship as fast as the steamer can work, but a minimum of seven days to be allowed merchants," must mean working days; therefore the Sunday is excluded in reckoning the lying days, and in that view no demurrage was incurred at the port of loading; but the lying days were all expended there. Then as to the unloading; the ship arrived in dock on the Tuesday; she could not get to her

(1) 10 M. & W. 331. (2) Law Rep. 8 C. P. 46.

berth till Wednesday at 8 a.m., and she began discharging then, and worked till 8 p.m. She began again on the Thursday at 4 a.m., and finished at 8 a.m. I am clearly of opinion, under these circumstances, that Thursday must be counted in favour of the shipowners. There is no ground for saying that in the case of demurrage there can be any division of a day without express stipulation to that effect. The inconvenience of such a proceeding would be very great, and the justice of the case seems the other way. It might be that by the detention of a few hours the ship had lost the whole day, or a tide; and even if she could get out for another port for a fresh voyage, very possibly she might not be able to get to the other place in time for loading. Therefore convenience and the language of the charterparty point the same way. If not discharged within the lay days, the charterer must pay for every day and fraction of a day at the stipulated rate of demurrage.

QUAIN, J. I am of the same opinion. It is perfectly clear that on this charter the plaintiffs are entitled to two days' demurrage. She got into the docks on the Tuesday, and got to a berth on the morning of Wednesday at eight, and worked till eight in the evening. That was a good working day—at least there was no evidence to the contrary. If the charterers do not discharge on the first day, and get into a second day, they are clearly liable for the whole day's demurrage. It was contended for the defendants that they are only liable for one day, or only for a fraction of the second; but it was not suggested how the proportion was to be calculated, and it is clear that, in the case of demurrage like this, we cannot go into the calculation of part of a day. As far as I could make out the argument, the defendants seek to set off the four hours lost on the first day against the four hours, from four to eight, of the second; but the ship got into dock on the Tuesday, and the shipowner is not responsible for a delay after that.

Rule discharged.

Attorneys for plaintiffs: *Maples, Teesdale, & Co., for Lietch, Dodd, & Bramwell, Liverpool.*

Attorneys for defendants: *Wilde, Barber, & Brown.*

1875
May 27.

HADGRAFT, APPELLANT; HEWITH, RESPONDENT.

Compulsory Pilotage—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 370, 379; 6 *Geo.* 4, *c.* 125, *s.* 5—"*Trinity House Outport District.*"

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353, the employment of pilots shall continue compulsory in all districts where it is compulsory at the time the Act passed. By s. 379, ships (inter alia) employed in the coasting trade of the United Kingdom, when not carrying passengers, shall be exempted from compulsory pilotage in "the Trinity House outport districts," which, by s. 370, comprise "any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter."

By the Ipswich Dock Act, 1852 (15 Vict. c. cxvi.), s. 3, a former Act, by which special provision was made for the appointment of pilots in the port of Ipswich, is repealed, and s. 91 enacts, as to the appointment of sub-commissioners, for examining pilots, &c., in the words of s. 5 of 6 Geo. 4, c. 125, except that they are described as persons "resident within" the port of Ipswich, instead of "at":—

Held, that s. 91 was not a "particular provision;" and that Ipswich was therefore a Trinity House outport district, and a coasting vessel not carrying passengers navigating that port was exempt from compulsory pilotage.

CASE stated by the justices of the borough of Ipswich, under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondent, under s. 353 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104 (1)), charging that the respondent, being master of the steamship *Eider*, navigated his ship without a licensed pilot in a certain part of the port of Ipswich.

The *Eider* had a British register, and was of the burthen of upwards of sixty tons, and was employed in the regular coasting

(1) 17 & 18 Vict. c. 104, s. 353: "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and every master of any unexempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling so to do, or employs or continues to employ an unqualified person to pilot her . . . shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship."

trade of the United Kingdom and belonged to the port of Ipswich, and was not on the day in question carrying passengers.

The appellant was a duly qualified pilot, and had offered to pilot the vessel.

The original local Act regulating the port of Ipswich was 45 Geo. 3, c. 101, and by ss. 1–3, certain commissioners were to be appointed with certain qualifications, and, by s. 52, pilots were to be licensed by those commissioners. This Act was repealed by 1 Vict. c. lxxiv. s. 1, which Act was itself repealed by the present Act, 15 Vict. c. cxvi. s. 3; and by s. 91 it is enacted as follows:

Whereas it is expedient that proper and skilful persons should be licensed and appointed pilots of the said port of Ipswich and the adjacent coast, and provision was made in the first-recited Act for licensing and appointing such pilots: It shall be lawful for the corporation of Trinity House, of Deptford Strond, and they are hereby required, to appoint from time to time (as often and for such periods as they in their discretion shall think fit) proper and competent persons (not to exceed five nor to be less than three persons), *resident within* the port of Ipswich, to act as sub-commissioners of pilotage for the said port, and who shall be called sub-commissioners of pilotage, and shall take the oath prescribed by 6 Geo. 4, c. 125, for the faithful discharge of their duty; . . . and shall examine, and they are hereby authorized (so long as their deputation or appointment shall not be revoked or superseded) to examine into the qualification of persons to act as pilots for the said port and the adjoining coasts; and it shall be lawful for the said corporation, upon their receiving a satisfactory certificate, under the hands of any three of such sub-commissioners if the whole number shall consist of four or five, and of any two if the whole number shall consist of three, that any such person, so examined as aforesaid, is duly qualified to act for such port and the adjoining coasts, to give a licence to such person to act as a pilot within the particular limits (describing the same) for which he shall have passed such examination; and when and so soon as the said corporation shall have licensed any pilot or pilots for the said port and the adjoining coasts, they shall cause such notice thereof to be given, and in such manner and form, and so to be published as a notice directed to be given by the said Act of 6 Geo. 4, c. 125, in the case of licences granted by the said corporation under the authority of that Act to pilots for any particular port or ports and the coasts near the same; and from and after a time or times to be limited in the said notice (which shall not in any case, or in relation to any vessel whatsoever, be less than six weeks from the publication thereof as aforesaid, and shall be proportionably more, at the discretion of the said corporation, in relation to vessels engaged in foreign voyages at the time of such publication), all vessels sailing, navigating, or passing into or out of the said port, or upon the coasts thereof, save and except under such circumstances as are saved and excepted in and by the said Act of Parliament, shall be conducted and piloted by such pilots only as shall be so licensed as aforesaid, and by no other pilots or persons whomsoever.

Sect. 92: The licences to be granted by the said corporation, under the authority of this Act, shall be granted in such form and for such period, and subject to

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such power of renewal and suspension, amendment, or revocation, as the licences granted under the said Act of 6 Geo. 4, c. 125; and such pilots, when so licensed as aforesaid under the authority of this Act, shall for all purposes and to all intents whatsoever be deemed and taken to be pilots licensed under the said Act of 6 Geo. 4, c. 125; and all and every the enactments, protections, provisions, forfeitures, penalties, matters, and things contained in that Act of Parliament, or conferred or imposed thereby, except as hereinafter provided, and all bye-laws made by the said corporation in pursuance thereof, shall be deemed and taken to apply to pilots so to be licensed as aforesaid under the authority of this Act, and to all masters and owners of vessels and other persons whatever, in the same manner and to the same extent, and the said forfeitures and penalties shall be recovered and applied in the same way, as if the said last-mentioned pilots had been duly licensed under the said Act of 6 Geo. 4, c. 125. (1)

[There were other sections of the local Act set out, raising other points, which the judgment of the Court renders it unnecessary to give.]

It was contended (inter alia), on the part of the appellant, that, although the appointment and control of pilots at Ipswich were vested in the Trinity House by the local Act, Ipswich is not a Trinity House outport district within the meaning of s. 370, subs. 3, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which describes Trinity House outport districts as "comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter," inasmuch as in the Ipswich district particular provision has been made by the local Act; and that therefore the exemptions relating to Trinity House outport districts, under s. 379 of the Merchant Shipping Act, which exemptions extend (inter alia) to all ships employed in the coasting trade of the United Kingdom, when not carrying passengers, do not extend to the present case.

It was contended (inter alia) on the part of the respondent, that Ipswich is a Trinity House outport district within the meaning of s. 370, subs. 3, of the Merchant Shipping Act, inasmuch as the provision for appointing pilots contained in the Ipswich Act places the appointment of such pilots upon the same footing as in Trinity House outport districts, and is not therefore such a "particular provision" as was contemplated by or is within the true meaning of subs. 3; and that therefore the *Eider* was exempted from compulsory pilotage by virtue of the exemptions relating to

(1) Sects. 121 and 122 of 1 Vict. c. lxxiv. were respectively in identical terms with the above ss. 91 & 92.

Trinity House outport districts contained in s. 379 of the Merchant Shipping Act, of ships not carrying passengers, (1.) employed in the coasting trade of the United Kingdom, or (5.) navigating within the limits of the port to which they belong.

The justices were of opinion that the *Eider* was exempted from compulsory pilotage, by virtue, inter alia, of the above provisions of the Merchant Shipping Act, and dismissed the information.

The question for the Court was, inter alia, whether the *Eider* was exempted from compulsory pilotage under the Merchant Shipping Act.

[*Graham*, for the respondent, intimated that he should rely chiefly on the exemption under ss. 370, 379 of the 17 & 18 Vict. c. 104, and should contend that s. 91 of the local Act was not a "particular provision," as was shewn by s. 92.]

Sutton for the appellant. There is a "particular provision" here; s. 91 is not identical, though nearly so, with s. 5 of 6 Geo. 4, c. 125. The sub-commissioners are to be persons "resident within" the port of Ipswich, whereas in the general Act they are to be so many persons "at" the port. Sect. 92 shews that the pilots are not appointed under the General Act, for the penalties are to be recovered, &c., *as if* the pilots had been appointed under the 6 Geo. 4, c. 125.

Graham for the respondent was not called upon.

BLACKBURN, J. I am of opinion that the magistrates were right in dismissing the summons. The 17 & 18 Vict. c. 104, s. 379, says: "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts: (1.) ships employed in the coasting trade of the United Kingdom." Sect. 353 had previously said that all exemptions from compulsory pilotage, existing when the Act came into operation, shall continue in force; but in *Reg.* v. *Stanton* (1) it was held that the two sections were independent, and that the one did not affect the other. Then what are Trinity House outport districts? They are defined by s. 370, subs. 3: "any pilotage district for the appointment of pilots within which

(1) 8 E. & B. 445; 27 L. J. (M.C.) 105.

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no particular provision is made by any Act of Parliament or charter." By 6 Geo. 4, c. 125, s. 5, enactments were passed as to the appointment by the Trinity House of sub-commissioners in such ports, for the purpose of examining and giving certificates to pilots for their respective ports. At the time of the passing of that Act, a local Act, 45 Geo. 3, c. 101, was in operation as to the port of Ipswich, and in it were special provisions as to the appointment of commissioners and the licensing of pilots. (1) But this statute was repealed by 1 Vict. c. lxxiv. s. 1, which Act was itself repealed by the existing Act for the port of Ipswich, 15 Vict. 6, c. cxvi. And the effect, no doubt, would have been to leave the appointment of pilots for Ipswich under the general Act; but it was thought safer, I suppose, to put in express terms how the pilots shall be appointed, and accordingly in s. 91 of the present Act, the very same mode for appointing sub-commissioners for the purpose of licensing pilots for the port of Ipswich, is given as in s. 5 of the general Act of Geo. 4, the only difference being that in the Act of Geo. 4 the sub-commissioners are described as not to exceed five nor to be less than three persons "*at* each port," whereas, in the local Act they are described as "*resident within* the port of Ipswich." Otherwise the two enactments are identical as to the mode of appointment of commissioners and licensing of pilots. I do not think that this slight difference makes s. 91 "a particular provision;" and consequently Ipswich comes within the definition of s. 370, subs. 3, of 17 & 18 Vict. c. 104, and the ship in question was exempted from compulsory pilotage, and the magistrates were right.

MELLOR and QUAIN, JJ., concurred that s. 91 of the Local Act was not a "particular provision."

Judgment for the respondent.

Attorney for appellant: *Farnfield, for A. A. Watts, Ipswich.*

Attorney for respondent: *E. Bromley, for Jackaman & Sons, Ipswich.*

(1) See ss. 1–3 and 52.

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1875
June 8.

Misdemeanor—Disobedience to Order of Commissioners under Statute—Form of Order—Epping Forest Act, 1872 (35 & 36 *Vict. c.* 95), *s.* 5.

By the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95), s. 5, the commissioners were authorized to make orders prohibiting, until the expiration of the session of Parliament next after their final report, any inclosures of land made before the Act of 1871, and for the prevention of any waste, injury, or destruction of vert, herbage, trees, &c., in or upon any land within the forest subject in their judgment to any forestal or common rights. The commissioners made an order, that until the expiration of the session of Parliament next after their final report, "all persons be and are hereby prohibited from committing any waste, &c., in or upon the waste lands in the forest within the manor of Theydon Bois (including inclosures of waste lands made within twenty years next preceding the said 21st of August, 1871), all which lands are distinguished, on a plan annexed, by the colour green."

The defendant was the occupier, as tenant, of a piece of land, part of the above waste lands, which was inclosed some time since 1851, and is part of the land coloured green on the plan, and persons claimed right of pasturage over all the waste lands. The order was served upon the defendant, and he afterwards committed waste by digging marl and clay, &c.; upon which an indictment was preferred against him for disobeying the order. A verdict of guilty having been entered:—

Held, that the order was good; and that disobedience to it was a misdemeanor.

INDICTMENT found by the grand jury of the county of Essex against the defendant for a misdemeanor alleged to have been committed by the defendant by breaking the soil of a portion of the waste lands of Epping Forest, within the manor of Theydon Bois, in the county of Essex, and thereby committing waste, injury, and destruction of and to the vert, herbage, trees, and other things in and upon the said land, contrary to an order made by the Epping Forest Commissioners, setting it out.

The indictment was removed by certiorari into this court.

By the Epping Forest Act, 1871 (34 & 35 Vict. c. 93) the Epping Forest Commissioners were constituted a body corporate for certain purposes in the Act specified.

By s. 5 of the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95) "The commissioners may from time to time make orders prohibiting, until the expiration of the session of Parliament next after they shall have made their final report under the Epping Forest Act, 1871, and no longer, any inclosures of any

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land within the said forest not inclosed before the passing of the Epping Forest Act, 1871, and for the prevention of any waste, injury, or destruction of vert, herbage, trees, shrubs, or other growing things in or upon any land within the said forest subject in their judgment to any forestal or common rights."

By the Epping Forest Act, 1873 (36 Vict. c. 5) the time for the commissioners to make their final report was extended to two years from the passing of the Act. (1)

On the 29th of November, 1872, the commissioners made an order in the following form: "We, the Epping Forest Commissioners, do, in pursuance of the authority to us given by the Epping Forest Amendment Act, 1872, hereby order, until the expiration of the session of Parliament next after we shall have made our final report under the Epping Forest Act, 1871, or until further order, that all persons whosoever be, and they are hereby, prohibited from committing any waste, injury, or destruction of or to the vert, herbage, trees, and shrubs, or other growing things, in or upon the waste lands of Epping Forest aforesaid, within the manor of Theydon Bois, in the county of Essex (including inclosures of waste lands within the said manor made within twenty years next preceding and since the 21st day of August, 1871), and all which lands are distinguished on the plan hereto annexed by the colour green. And all persons affected by this order are to be at liberty to apply to us as there may be occasion."

The order was served on the defendant on the 19th of April, 1873. Previous to the service of the order on the defendant, the fact of such order having been made was brought to the notice of the defendant, who by his counsel applied to the commissioners as a person affected by the order, as by the order was directed; but the commissioners refused to entertain the question raised by the defendant's counsel.

The defendant is in occupation as tenant of a certain piece of land within the forest and the manor of Theydon Bois, and formerly part of the waste land of the manor, which piece of land was part of that coloured green on the plan to the order annexed.

The piece of land is let to the defendant by J. W. Couchman,

(1) The time was further extended by 38 Vict. c. 6, to one year after the passing of the Act

who purchased the fee simple thereof, together with all rights in or over the same, from F. W. Straker and W. Martindale, who held the same by a title duly derived from a grant by the trustees of the Hall Dare estates, in which estates were included the manor of Theydon Bois, they, the trustees, having at that time all the rights of the lord of the manor.

The piece of land was inclosed and surrounded with a wire fence previously to the passing of the Epping Forest Act, 1871, and subsequently to the year 1851.

By a deed dated the 17th of April, 1857, the honourable J. H. Howard, one of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues duly authorized in that behalf, granted and released all the rights of forest of the Queen's Majesty upon and over certain lands and hereditaments within the manor of Theydon Bois, of which lands and hereditaments the piece of land in the occupation of the defendant formed a part.

The prosecutor, Thomas Sears, and other persons inhabitants within the forest, claim a right of pasturage for cattle on all waste lands within the forest.

The defendant by his servants, on the day in the indictment mentioned, and after the service of the order of the commissioners upon the defendant, broke the soil of the piece of land in the occupation of the defendant, and injured the vert and herbage thereon growing, and took therefrom marl and clay for the purpose of carrying on the defendant's business of a brickmaker.

It was agreed that the indictment and plea should form part of this case, and that the defendant should be at liberty, on the argument of the case, to take all objections to the indictment (1), and to raise all questions which it would have been open to him to take at any stage of the trial; and that the Court should be at liberty to draw any inferences or find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

The question for the opinion of the Court is whether the defendant can be convicted of a misdemeanor upon the said indictment.

Edward Clarke, for the prosecution. The Epping Forest Com-

(1) On the argument no objection was taken to the form of the indictment beyond those involved in the objections to the order.

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missioners, appointed under 34 & 35 Vict. c. 93, s. 2, have power to make orders by 35 & 36 Vict. c. 95, s. 5.

[*Noel Paterson*, contrà, intimated that he should contend that the order did not shew that the commissioners had exercised any judgment as to the lands being subject to right of common.]

The order the commissioners made is not perhaps as formal as it might have been; but it sufficiently expresses that in their judgment the lands referred to in the order are subject to forestal or common rights. By s. 17 of 34 & 35 Vict. c. 93, "waste lands of Epping Forest" are defined as all lands within the forest which have not been lawfully inclosed; the lands in question are called in the order "waste lands," and the case finds that they were inclosed since 1851, and that there are rights of common claimed over them; so that in effect the order is sufficient.

[LUSH, J. The order is not final, but only suspends the right. Does not the making of the order of itself imply that in the commissioners' judgment the land is subject to rights of common?]

The only other question is, whether disobedience to this order is an indictable offence and punishable at common law as a misdemeanor? This point was expressly decided in the affirmative in *Rex* v. *Harris* (1) as to an order of the King in Council by virtue of a statute, and the principle is applicable to an order of public commissioners; at all events, when no other mode of enforcing the order is given by the statute. [He also referred to *Rex* v. *Smith* (2) and *Reg.* v. *Buchanan.* (3)]

Noel Paterson, for the defendant. First, an indictment will not lie for the disobedience of the order of the commissioners. No doubt an indictment lies for the disobedience of an order of quarter sessions: *Rex* v. *Robinson* (4); but that is in the nature of a judgment of a judicial tribunal. Again, an Order of the King in Council under a statute for a general purpose is very different from an order of commissioners for a mere local purpose.

[LUSH, J. An order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids; the statute delegates to others, here the commissioners, the power to say what shall or shall not be done.]

(1) 4 T. R. 202.
(2) 2 Dougl. 441.
(3) 8 Q. B. 883.
(4) 2 Burr. 799.

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The matter of this statute is not of a sufficiently public nature to make disobedience of it a subject for indictment. In Hawkins, P. C. b. 2, c. 25, s. 4, it is laid down: "Also if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment."

[QUAIN, J. The preamble to the first Act (34 & 35 Vict. c. 93), shews that the matter of the statute concerns the public in general.]

By the Act of the present session (38 Vict. c. 6, s. 2), a penalty, to be recovered upon summary conviction, is imposed for disobedience to any order of the commissioners; which shews that the legislature thought there was before no mode of enforcing the orders. Secondly, the order is bad. It is not an order within the statute; it expresses no judgment that the lands are subject in the opinion of the commissioners to forestal or common rights. Acting under a special authority the commissioners ought to have shewn specially how they pursued their authority: Anon. Loft. at p. 439.

[LUSH, J. The making of the order is a judicial act, and expresses that in the commissioners' judgment the lands in question are waste lands, and so subject to rights of common.]

The order is not the kind of order contemplated by the statute. It is a mere general order, and therefore not binding, without more, on the individuals intended to be affected by it.

Edward Clarke was not called upon to reply.

LUSH, J. I have already expressed my reasons for thinking that the order is sufficient, and that the indictment is good.

QUAIN, J., concurred.

Judgment for the Crown.

Attorneys for prosecution: *Horne & Hunter.*
Attorneys for defendant: *Dingwall & Wall.*

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June 1.

KAY *v.* OXLEY.

Easement—Right of Way—Grant of new Way by general Words, "All Ways and Rights of Way, occupied or enjoyed, or reputed as appurtenant."

11 C.L.D. 469
12 C.L.D. 38
5 C.P.D. 377
382
19 Ch.D. 646-9
11 Q.B.D. 852

Defendant was owner in fee of a dwelling-house, together with a cottage and stable belonging to it, called "Roseville," and was also owner in fee of an adjoining farmstead and farm, having a private road which led from a high road to the farm buildings, and passed close to one side of the stable of Roseville. By indenture of the 1st of May, 1860, defendant demised Roseville to H. for ten years. H. entered on the premises, and built over the stable a hay loft, with two openings towards the private farm road, having first obtained permission from defendant to do so, and also permission from defendant and the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, &c., to the loft, that being the only access to the openings in the loft. H. and the sub-tenants occupying Roseville continued during the term to use the road up to May, 1870; at that time plaintiff agreed to purchase Roseville of defendant; and by deed of the 2nd of August, 1870, Roseville, &c., was conveyed by defendant to plaintiff in fee, "together with all . . . ways and rights of way, . . . easements, and appurtenances to the said dwelling-house, cottage, and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto":—

Held, that the right to use the farm road for the aforesaid purposes passed to the plaintiff under the above words.

Langley v. *Hammond* (Law Rep. 3 Ex. 161) discussed.

CASE stated by an arbitrator, after verdict, taken by consent, for the plaintiff.

The action was brought to try the right of the defendant to obstruct a way which the plaintiff claims a right to use over defendant's land for certain purposes.

The following are the material parts of the case:—

On and previous to the 1st of May, 1860, the defendant was the owner in fee of a dwelling-house, together with the cottage, stable, outbuildings, and garden thereto belonging, now the property of the plaintiff, and called "Roseville," situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, abutting upon a public highway called Horse Shoe Lane, leading from Leeds to Seacroft; and defendant was also the owner in fee of an adjoining farmstead and farm called Rose Cottage Farm, abutting also upon the same highway, and having a private farm road lead-

ing from it to the farm buildings, stack-yard, and other premises connected therewith, and to a field adjoining them.

By an indenture of lease, dated the 1st of May, 1860, defendant demised Roseville to R. J. Hudson for a term of ten years from that date, together with "all and singular the rights, privileges, easements, advantages, and appurtenances whatsoever to the said messuage and premises thereby demised, belonging, or in anywise appertaining or therewith used or enjoyed."

At the time of the demise the stable had no upper story, and was of the same height as the adjoining cottage demised with it.

Hudson entered at once into possession, and in the same year built at his expense a hay chamber or upper room over the stable, with two square openings in the east wall of the chamber, of the respective dimensions of 4 ft. 7 in. by 2 ft. 1 in., and 2 ft. 10 in. by 2 ft. 10 in., for the purpose of getting his corn, hay, and straw into his hay chamber, and for which purpose they were adapted. Both openings were fitted with shutters and the shutters to one of them opened outwards. There were no other means for the admission of light and air into the chamber except a man-hole, 2 ft. 6 in. by 2 ft. 1 in. square, cut through the south-east corner of the floor.

The east wall and the openings abutted upon and looked into the stack-yard and adjoining premises of Rose Cottage Farm; and there was no access to them with carts and waggons out of any part of the premises demised to Hudson, and the only way by which carts and waggons could be brought up to them was by taking them along the private farm road of Rose Cottage Farm.

Before making these alterations, Hudson consulted the defendant and Robert Barber, who was then the defendant's tenant of Rose Cottage Farm, upon them, and obtained their consent to them, and, at the same time, their permission to use Rose Cottage Farm private road to get to the hay chamber, when completed, with his cart and waggon loads of hay, corn, and straw.

No openings were made in the opposite or west wall of the hay chamber.

The lessee Hudson remained in occupation of Roseville and premises until about March, 1863, when he sublet them to a Mrs. Fletcher, who remained in occupation twelve months; and on her quitting them, Hudson sublet them to Richard Green, who re-

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mained in occupation up to the expiration of the aforesaid lease of 1860, and was in actual occupation and using the defendant's farm road, as Hudson had done, to get hay and corn into the hay chamber at the time when the plaintiff purchased from the defendant, as hereinafter mentioned.

In 1868, the defendant entered into the occupation of Rose Cottage Farm himself, and has continued to occupy it to the present time, having a bailiff residing in the farmstead; and he has been all along and still is the owner of it.

All the time Hudson and his under-tenants were in occupation of Roseville they respectively used the defendant's private farm road with their carts and waggons to get their hay, corn, and straw into the hay chamber, and were never interrupted or interfered with by the defendant or his tenants or servants.

The permission which the defendant gave to his lessee Hudson before building the hay chamber was never withdrawn, but on a few occasions the servants of Hudson and Green asked permission of the defendant's tenant and bailiff to use the road.

In May, 1870, the plaintiff agreed with the defendant to purchase Roseville; and by a conveyance, dated the 2nd of August, 1870, defendant conveyed to plaintiff in fee "all that messuage or dwelling-house, with the outbuildings, conservatory, gardens, and pleasure grounds thereto belonging, called Roseville, situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, and abutting upon Horse Shoe Lane, leading from Leeds to Seacroft; And all that cottage, stable-yard, outbuildings, and close of land adjoining the said messuage or dwelling-house; Together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, and rights of way, waters, watercourses, drains, cisterns, lights and rights of light, liberties, privileges, easements, advantages, and appurtenances whatsoever to the said messuage or dwelling-house, cottage, land, and hereditaments, or any of them, appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto."

At the time of the conveyance the hay chamber, with the two openings in the east side, stood precisely as it had been erected by Hudson.

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The plaintiff entered into possession, and began at once to use the defendant's farm road to bring his carts and waggons up to the openings in the hay chamber, and so to get his hay and straw into the chamber, and continued to do so without interruption up to May, 1873, when, and ever since, he has been refused the use of the road by the defendant.

As things were at the time of the purchase by the plaintiff and now are, the plaintiff had not, nor has he now, any way of putting hay, corn, and straw into his chamber except by using the defendant's farm road, or incurring expense in the necessary alteration of his buildings and premises which he purchased from the defendant.

The question for the Court was, whether the plaintiff has a right of way over the defendant's private farm road to and for the use of his hay chamber for the purposes mentioned or any or either of them, either by virtue of or ancillary to the conveyance of 1870.

J. W. Mellor (*Dugdale* with him) for the plaintiff. Although the right to use this farm road can scarcely be said to be a way of necessity, still, looking at the facts, which were all known to the defendant, and then coupling them with the words used in the conveyance, it was obviously intended that this right of way to the openings in the hay loft should pass to the plaintiff. In Gale on Easements, 4th ed. p. 80, it is said: "Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner 'uses language to shew that he intended to create the easement de novo': per Bayley, B., in *Barlow* v. *Rhodes*. (1)" The editor then refers to *Worthington* v. *Gimson* (2), in which Crompton, J., approved of the above passage, and then the author goes on: "General words, such as 'appertaining, belonging,' &c., have been held in numerous instances, both with regard to rights of common and way, to be insufficient to pass the right upon severance of the tenements; but a conveyance containing the words 'used, occupied, and enjoyed,' has been held to be sufficient." And he cites many cases supporting this proposition. If the conveyance had stopped at the word "appertaining" it might not have

(1) 1 C. & M. at p. 448. (2) 2 E. & B. at p. 626; 29 L. J. (Q.B.) at p. 119.

6 Jur. N.S. 1053.

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been sufficient to carry this right of way. But "heretofore used and enjoyed" is quite sufficient: see per Wightman and Crompton, JJ., in *Polden* v. *Bastard* (1), and per Erle, C.J., in the same case in error (2); *Hinchliffe* v. *Earl Kinnoul* (3); *James* v. *Plant* (4), in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. (5)

The Court then called upon

Herschell, Q.C. (with him *W. J. E. Bennett*), for the defendant. The words used are no doubt sufficient to revive a right of way suspended by unity of possession, but not to create a right de novo. In all the cases in which such words as the present have been held to pass a right of way, the way had been thus suspended: see 2 Williams' Notes to Saunders, p. 809, n. (c). In *Thomson* v. *Waterlow* (6) Lord Romilly, M.R., draws this distinction between an old right of way suspended and a way which never before existed as a right; and Kelly, C.B., adopted this in *Langley* v. *Hammond*. (7) It must be admitted, however, that the Lords Justices in *Watts* v. *Kelson* (8), seem to have doubted this distinction and agree with what Bramwell, B., said in *Langley* v. *Hammond*. (9) It is to be observed that the use of this road by the tenant was simply a licence revocable at any time.

[BLACKBURN, J., referred to *Liggins* v. *Inge*. (10)

LUSH, J. Admitting the licence to have been revocable, the way was actually enjoyed by the tenant up to the time of the conveyance to the plaintiff.]

Assuming that a right can be thus created de novo; still, looking at the facts coupled with the words used, there is no such intention shewn.

[LUSH, J. The note in 2 Notes to Saund. p. 809, certainly seems to justify the proposition for which it was cited; but I cannot see why a right of way cannot be created in this way. If the conveyance had said, together with the right to use the road as Green has used it, there could be no doubt that it might have been created;

(1) 4 B. & S. 258, at p. 263; 32 L. J. (Q.B.) 372.
(2) Law Rep. 1 Q. B. 156, at p. 161.
(3) 5 Bing. N. C. 1.
(4) 4 Ad. & E. 749.
(5) 5 B. & Ad. 791.
(6) Law Rep. 6 Eq. at p. 41.
(7) Law Rep. 3 Ex. at p. 168.
(8) Law Rep. 6 Ch. Ap. at pp. 172, 174.
(9) Law Rep. 3 Ex. at p. 170.
(10) 7 Bing. 682, at p. 693.

and why not by the description of all ways used or reputed as appurtenant ?] 1875

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J. W. Mellor added nothing in reply.

BLACKBURN, J. I think when we come to understand this case that the plaintiff is entitled to the right of way. The facts are these: the plaintiff purchased Roseville of the defendant, and the defendant by the deed conveyed to the plaintiff the lands and hereditaments, together with all, &c. [The learned judge read the clause.] It is not disputed that if the conveyance had stopped at the word "appertaining," the plaintiff's case might not have been sustainable, but it goes on to add the words: "or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." We have now to look at the facts in order to see whether the particular right of way in question was in fact occupied or enjoyed or reputed as appurtenant to Roseville. Mr. Herschell says that, where a man is occupier of two adjoining pieces of land, and uses both for the convenience of himself as the actual occupier of both, anything that he may do on the one is primâ facie not a right appurtenant to the other, and would not pass as appurtenant; and that when he passes across the one close to the other, he exercises the right of going from one to the other merely for his convenience as occupier of the two, and that he does not primâ facie enjoy or occupy the way as appurtenant to the other, and that the way would not pass as a right enjoyed or as appurtenant. But though that may primâ facie appear to be the case; yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being enjoyed as appurtenant.

The first case relied on for the defendant is *Thomson* v. *Waterlow* (1), before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is

(1) Law Rep. 6 Eq. 36, 41.

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reported to have said: "There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties." I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: "I do not think that the judges in *James* v. *Plant* (1) intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place." Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises—it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to shew that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.

In *Langley* v. *Hammond* (2) the Lord Chief Baron is reported to have laid it down as matter of law: "Since it does not appear here that at any antecedent time," that is, before the unity of possession, "there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words"

(1) 4 Ad. & E. 749. (2) Law Rep. 3 Ex. at p. 168.

(together with all ways used or enjoyed therewith) "cannot make or revive a right of way that never before existed." And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson* v. *Waterlow*. (1) No doubt the Lord Chief Baron so lays down the law; and if that had been the decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my Brother Lush suggested in the course of the argument, had been "together with the right of way which Green de facto has enjoyed of passing over the private farm road," supposing that had been a right of way never enjoyed as of right, but merely a way de facto used, still I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, and which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction, and taking it in that way, which is the point Martin, B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's dictum, I do not think that what the Master of the Rolls said amounted to so much; but if it did, we have the dicta of the Lords Justices James and Mellish in *Watts* v. *Kelson* (2), shewing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only de facto used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right de novo, in the other merely revived. But it makes a great difference, as matter

(1) Law Rep. 6 Eq. at p. 41.
(2) Law Rep. 6 Ch. Ap. at pp. 172, 174.

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of evidence on the question, whether the way was used and enjoyed as appurtenant.

We have now to apply this to the facts of the present case. As a matter of evidence we find it stated in the case that Hudson, the then tenant of Roseville, who held on a lease for ten years, made a hay loft, with two large openings to admit the hay, which could not be used except by bringing the hay in carts below them along the farm road, and these openings, though not absolutely essential to the use of the hay loft, were extremely important and material for the use of it. Before Hudson built the loft and made these openings, he applied to the defendant, the freeholder of the farm and landlord of Roseville, and obtained his consent to the alterations being made; and at the same time Hudson asked and obtained leave to use the private farm road in question to get the hay and straw in carts to his hay chamber. Hudson remained in occupation of Roseville until March, 1863, when he sub-let to Mrs. Fletcher, who remained in occupation twelve months; and on her quitting, Hudson sub-let to Green, who remained in occupation up to the expiration of the lease, and was in actual occupation and using the defendant's farm road as Hudson had done, to get hay, straw, and corn into the loft, at the time when the plaintiff purchased Roseville from the defendant. I do not think it necessary to consider whether or not that parol licence, which was given by the defendant, to use the road, was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol licence to do; or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The licence was not in fact revoked. The tenant for the time being of Roseville continued to use the road as appurtenant to it, and had the apparent necessity of using it for the purpose of getting to the two large openings in the loft, exactly in the same way as if the consent of the defendant had been in writing, and a wafer stuck on it. There would not have been the slightest difference in the use and enjoyment of the road. In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant. I think in considering the words, we should see what they really mean, and apply them to

the state of circumstances existing at the time of the conveyance; and I think this right to carry hay and straw to these two openings was in point of fact then occupied, and enjoyed, and reputed as appurtenant to these premises; and therefore that the plaintiff is entitled to judgment.

LUSH, J. I am of the same opinion. The only question is whether the words of this conveyance manifest an intention that the mode of access which had been used by the tenant of Roseville to the hay loft for the purpose of conveying fodder there, should pass to the plaintiff under that conveyance as a right of way. It is beyond doubt, as a fact, that during the subsistence of the lease, the tenant and his successors had used this way for the purpose of conveying hay and straw, &c., to the hay loft. It was the only mode of access to these openings, and it existed up to the time when the purchase was made by the plaintiff. The conveyance of the house and stable, together with the other premises, has these words, "Together—[The learned judge read the clause]. The latter words were clearly intended to pass, if there were any such thing enjoyed, something not strictly appurtenant to the premises, which could not have been claimed as a matter of right without these larger words. Applying that to the facts as they existed at the time of the conveyance, there was a way which had been used by the tenant for the time being as a mode of access to a part of the premises, namely, the hay loft, and which had been used and enjoyed as if that way had been appurtenant to it, and the language used, I think, expresses, when you come to apply it to the facts, the intention to pass this right of way as specifically as if the conveyance had said "including all the ways and easements to the hay loft as the same have been heretofore enjoyed by Green." That undoubtedly would have passed this way. I certainly was struck with the observation of Mr. Herschell, that in none of the reported cases does it appear that the way claimed and held to pass had been newly created as a right by the deed in question. Mr. Herschell says that in all the cases it appears (and certainly the note in 2 Wms. Notes to Saund. p. 809 n. (c) does justify that position) that there had been originally a right of way

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appurtenant to the premises which had been suspended, but not extinguished by unity of possession; and the question in all the cases was whether the general words used in the conveyance were intended to revive the right. I certainly was struck with that observation, because I have an impression even now, that there are cases to be found in which rights of way have been thus created by deed. But however that may be, I cannot see anything to prevent the acquisition of such a right by the words used in the present instance. I do not think that we are at all acting in conflict with the decision of the late Master of the Rolls in *Thomson* v. *Waterlow*. (1) That case is obscurely stated, but I collect from the terms of the judgment that there had been no specific defined portion of the soil appropriated by the owner as a roadway to the severed property as appurtenant to it, but that he had been used to ride across one field in any direction he thought proper in order to get to another field. As to the case in the Exchequer of *Langley* v. *Hammond* (2), I think that case is rightly decided, although not on the ground put by the Lord Chief Baron. I prefer the ground on which my Brother Bramwell puts it. Looking, therefore, at the language used, I think it was intended to grant this right of way or access to the hay loft, just as if it had been expressed in terms that it was intended to pass the use of the road as the access to the hay loft, as it had been enjoyed by Green, who had held the premises up to the time of the conveyance.

BLACKBURN, J. With regard to the observation on the older cases, I may add that in *Kooystra* v. *Lucas* (3) it does not appear affirmatively whether the right of way claimed had or had not been created before. The judges make no mention one way or the other; but the Chief Justice's direction was that the plaintiff was entitled to the right of way claimed for his cattle to the spot of ground on which he had built his stable and coach-house, "that being a part of the demised premises to which such a way had been used previously to 1814," the date of the conveyance. It might have been that the right of way existed

(1) Law Rep. 6 Eq. 36. (2) Law Rep. 3 Ex. 161, 168, 170.
(3) 5 B. & Al. 830, at p. 833.

before the unity of possession, but that is certainly not stated affirmatively.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Clarke & Son.*

Attorneys for defendant: *Phelps & Sedgwick.*

DUNCOMBE *v.* THE BRIGHTON CLUB AND NORFOLK HOTEL COMPANY.

June 17.

Interest, Recovery of—Where Debt is Payable at "a certain Time" under a Writing—3 & 4 Wm. 4, c. 42, s. 28.

In order to entitle a creditor under s. 28 of 3 & 4 Wm. 4, c. 42, to interest on a debt from the time when the debt was payable, "if such debt be payable by virtue of some written instrument at a certain time," it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterwards.

Therefore, where plaintiff supplied furniture to defendants on the written terms, "one third in cash, and bills at six and twelve months for the balance":—

Held (by Mellor and Lush, JJ.; Blackburn, J., dissenting), that the case was within the section, and the plaintiff was entitled to interest on the one third from the time the goods were delivered.

DECLARATION for goods sold, interest, &c.

Plea: Never indebted.

At the trial before Denman, J., at the last Sussex spring assizes, it appeared that the plaintiff, in 1865–6, supplied furniture to the defendants' hotel under the following circumstances. Negotiations having taken place between the plaintiff and the secretary to the company, the plaintiff on the 28th of September, 1865, wrote to him as follows: "I have thought over your application respecting the Norfolk Hotel; the best terms I could offer would be one-third in cash, and bills at six and twelve months for the balance." These terms were ultimately accepted, and the plaintiff accordingly furnished the hotel. The furnishing was completed in March, 1866, and on his application for payment the plaintiff was desired by the defendants' secretary to send in his account, which he accordingly did on the 14th of April, amounting to 3169*l.* 1*s.* 11*d.* The defendants paid 800*l.* out of the 1056*l.* (one-third cash), leaving 256*l.* unpaid. This

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sum had since been paid or compounded for; but the plaintiff claimed, inter alia, interest on this sum under 3 & 4 Wm. 4, c. 42, s. 28. (1) The plaintiff's chief cause of action was on a special agreement between one Legge and himself, but this failed for want of authority in Legge to bind the defendants; and the learned judge directed a nonsuit, with leave to the plaintiff to move to enter a verdict for such sum as the Court should direct, if the Court should be of opinion that the plaintiff was entitled to claim interest.

A rule was afterwards obtained accordingly.

Day, Q.C., and *Holl*, shewed cause. No doubt the letter of the plaintiff means that he is to be paid one-third cash on delivery of the goods, or rather when the furnishing should be completed. But that is not sufficient within s. 28 of 3 & 4 Wm. 4, c. 42. The time must be named in the written instrument; and it is not sufficient that the payment is to be made on an event the time for which is uncertain. If such an agreement as the present is within the statute, interest would be payable in every case where goods are supplied for ready money on a written order. There is scarcely any case in point under the statute; but the case of *Gordon* v. *Swan*, given in a note to *De Bernales* v. *Fuller* (2) shews that this would not have been a time certain so as to entitle the plaintiff to interest at common law.

[BLACKBURN, J. The case of *Harper* v. *Williams* (3) is cited in the notes to the statute in Chitty's Statutes, and seems, as far as I can understand it, in the defendants' favour.

LUSH, J. According to the defendants' argument, the sum

(1) 3 & 4 Wm. 4, c. 42, s. 28: "That upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: Provided that interest shall be payable in all cases in which it is now payable by law."

(2) 2 Camp. at p. 429, n.

(3) 4 Q. B. 219, at p. 234.

certain must also be ascertained by the written instrument. If such certainty is required as to the time, the same certainty must be required as to the debt, for the words are identical, mutatis mutandis.]

The section does not require that the sum certain should be mentioned in the written instrument, but it does require that the time certain should be.

[MELLOR, J. That certainly would appear to be so.]

Parry, Serjt. (*Grantham* with him), in support of the rule. It is not disputed that the letter of the plaintiff shews the terms on which the furniture was to be supplied, and that the plaintiff was entitled to one-third in cash on completion of delivery. This is all the statute requires, viz., that the time for payment shall be fixed by some written instrument, and the debt is payable at a certain time by virtue of the instrument, although the date of the event on which the payment is to be made is not (and in this case could not be) stated in the instrument. As soon as the furniture was delivered and the account sent in and agreed to by the defendants (and they never disputed the amount, but have paid the principal) the debt and time of payment both became certain.

[BLACKBURN, J. That argument makes the words "at a certain time" surplusage. But if the section means payable at a certain time ascertainable from the written instrument, then they are not surplusage.

MELLOR, J. The defendants' contention is, that all that is necessary is that the terms or basis of the contract shall be declared in the written instrument.]

Yes; that the time of payment shall be fixed by the instrument, although the exact date of payment must depend on the future event, the delivery of the goods.

BLACKBURN, J. Upon the point, whether on the sum that was payable in cash the plaintiff is entitled to interest, we are not all agreed. It only comes to a small sum, but the amount is immaterial. This is an action for goods sold and delivered. As soon as the goods were delivered, no doubt the amount due became a sum certain; there is equally no doubt that at common law, before the statute of Wm. 4 was passed, interest could not have been

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given. I confess that it seems to me, in reason and common sense, that, if the money for goods sold and delivered is not paid at the proper time, it should be paid with interest; but, however, the rule at common law did not give interest in such a case, and if authority for that was wanted the case which has been cited in the note to *De Bernales* v. *Fuller* (1) would be sufficient.

But the question is, whether the plaintiff may not recover this sum under the statute 3 & 4 Wm. 4, c. 42. The words of s. 28 are, "That upon all debts or sums certain, payable at a certain time, or otherwise"—that is, as I understand it, upon all debts or sums certain, whether originally payable at a certain time, or whether the time has become certain subsequently. A debt or sum certain is a debt that is payable at the time you issue the writ, the time must then have been ascertained. Therefore I think that "upon all debts or sums certain payable at a certain time, or otherwise" means debts or sums certain, whether originally payable at a fixed date, or whether the time is afterwards ascertained before the writ is issued, although not fixed originally. Then the section goes on,—"the jury on the trial of any issue, or on any inquisition of damages may, if they think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable,"—this is the important part—"if such debts or sums be payable by virtue of some written instrument at a certain time." The question is, whether this is a debt or sum payable by virtue of some written instrument at a certain time. On that we have to see what is the instrument, and what is the construction of the statute. The instrument is a letter by which the agreement was made that the goods should be sent in and delivered at the hotel, and then, by implication, that the amount should be payable, one-third in cash, one-third by a bill at six months, and one-third by a bill of twelve months. I have not the slightest hesitation in saying that the written instrument, by virtue of which the debt became payable, contemplated a particular day, which, when the goods were delivered, would be ascertained, and then the money would be payable at a certain time. But did the debt become payable by the written instrument at a certain time? My

(1) 2 Camp. 429, n.

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Brother Parry's argument is that it did, because the written instrument shewed that it would become a certain sum on a certain event, and the time, which would also be ascertained when the goods were delivered, was a sufficiently certain time within the meaning of the statute. On that I have come to an opposite conclusion, because it seems to me, that, if that were meant, the statute would have been more clearly worded; if that were the intention of the legislature, they would have left out the words "at a certain time," which seems to me to be surplusage, if my Brother Parry's construction is correct. I think that the construction of the statute is, that the written instrument should specify the time; and if that be so, the written instrument in this case does not do it. I am surprised that there is so little authority upon the subject. I had some idea that the point has been decided, but it turns out that there is very little authority, if any. I thought, at first, that *Harper* v. *Williams* (1) indicated that the Queen's Bench at that time took the view of the statute I am expressing; but when one looks at that case and at the letters, it does not seem to be very clearly brought out that the Court must have entertained this opinion; and I do not think that my learned Brothers' view will be in opposition to that case. My impression is, that the Court did put that construction upon this statute; but it was immaterial to the merits of the case before them. I do not think it was a very deliberate construction of the statute, and consequently we have now to decide what the words mean. I have already expressed my opinion that they do mean that the debt or sum certain must be payable at a certain time by virtue of the written instrument, and that it is not enough that it afterwards became payable on a certain day. The section does not mean by "a certain time," a time which is to depend on a future named event, which will, when the event happens, become certain. Whilst I take that view of the section, and consequently think that my Brother Parry is not entitled to get this interest, I cannot say I am at all sorry that my learned Brothers take the opposite view. It works out what for many years I have thought the statute ought to have said, that wherever there is a debt at all it should bear interest, unless there is some strong reason to the contrary. How-

(1) 4 Q. B. 219, at p. 234.

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ever, as the statute stands, I think the plaintiff is not entitled to interest; but as my learned Brothers are of a different view the verdict must be entered for the plaintiff for the interest claimed.

MELLOR, J. I confess, with regard to the point on the statute of 3 & 4 Wm. 4, I have had some doubt; and early in the argument, I certainly had the opinion that the case did not come within the statute; but upon reflection, and hearing the further argument, and attending more closely to the terms of the letter of the plaintiff, and looking at the words of the 28th section upon which this turns, "if such debts or sums be payable by virtue of some written instrument at a certain time," I have come to a different conclusion. I think that the object of the section was, not that the actual day should be ascertained upon the face of the instrument, but that the basis of the calculation which was to make it certain should be found in the instrument in writing. Now, as I understand from the letter of the 29th of September, 1865, the goods were to be paid for, one-third in cash, one-third by a bill at six months, and the residue by a bill at twelve months. I think that when the goods were sent in the time for the payment of the one-third in cash had arrived, and all the rest of the calculation must depend upon that; and it was quite sufficient if there was a time fixed which by extrinsic facts could be made to identify the date for the calculation, without its appearing in so many words upon the face of the instrument. That is to say, it is not necessary that the day for payment should be named, e.g., "The debt will be due on the 1st of October;" but it is sufficient if the time can be ascertained by the terms which are in writing, and which enable the jury to form a safe basis of calculation as to the time certain at which it is to be payable. That is the view I take of it. I do not feel very confident, simply for the reason that my Brother Blackburn takes a different view. At the same time I think mine is the larger view of the statute. My Brother Blackburn's is a narrower construction than I am disposed to put upon it. I am, shortly, of opinion that if the basis of the calculation is to be found in the written instrument, that is enough.

LUSH, J. Upon the construction of the statute 3 & 4 Wm. 4, c. 42, s. 28, I own I have never been able to entertain any doubt

myself further than that derived from the strong opinion of my Brother Blackburn; but for that, on reading the words of the statute, I should have at once come to the conclusion, very satisfactory to my own mind, that this was a case contemplated by the statute. I agree with my Brother Blackburn that the early part of the section which we are now discussing intends that the written document should specify the time of payment; but then it appears to me that the section does not require that it should so specify it by mentioning the day of payment. The written document would equally accomplish the object of the statute, if it specified the event upon which the payment was to be made. The section says, "upon all debts or sums certain payable at a certain time, or otherwise;" that "otherwise" is put in to contrast with "at a certain time." It means, I think, payable originally by the contract of the parties at a time certain, or not at a time certain, — where the time is fixed by the agreement of the parties, or not fixed by the agreement of the parties. But where it is fixed by the agreement of the parties, it shall appear in writing. That being so, then the interest runs from the date when the payment is to be made. As I have said, it does not seem to me material whether that is done with reference to a named event on which payment is to be made, or by naming the day. The other case, "or otherwise," is where no time is fixed for payment, then the creditor, the amount being due, may make interest to run from the time he chooses to demand it provided he makes the demand in writing. In this case the contract is, one-third to be paid in cash, that is, in ready money, as soon as the goods are delivered and the invoices are delivered, so that the amount can be ascertained. So that the time of payment is fixed by the contract of the parties, and it is to be determined by the time when the goods are delivered. That is, I think, in accordance with and in analogy to cases decided upon the well-known maxim: "Id certum est quod certum reddi potest." It appears to me that maxim is applicable to this statute. There are instances quoted in Broom's Maxims, 5th ed. p. 623: "Although every estate for years must have a certain beginning and a certain end, albeit there appears no certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth;"

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citing Co. Litt. 45 b.: "therefore if a man make a lease to another for so many years as J. S. shall name, this is a good lease for years; for, though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty." I think that is strictly applicable to the writing contemplated by this section; and I see no reason why the legislature should have required that the very day of payment should be specified in the agreement itself. What was in their contemplation was, that the time of payment should be fixed by the parties, and that that should appear by the best of evidence, namely, a writing. That being so, if the time or event upon which payment is to be made is capable of being ascertained from the writing, that part of the section is satisfied; and that appears to be the case in the instrument now before us.

Rule absolute.

Attorney for plaintiff: *Mills, Brighton.*
Attorneys for defendants: *H. Kimber & Co.*

May 31.

WEMYSS, APPELLANT; HOPKINS, RESPONDENT.

Conviction—First Bar to Second Conviction—5 & 6 Wm. 4, c. 50, s. 78 24 & 25 Vict. c. 100, s. 42.

1 & D. 69.

The appellant was summarily convicted under s. 78 of 5 & 6 Wm. 4, c. 50, for that he, being driver of a carriage on a highway, by negligence and wilful misconduct, to wit, by striking a horse ridden by the respondent, caused hurt and damage to the respondent; he was afterwards convicted, on the same facts, under s. 42 of 24 & 25 Vict. c. 100, for unlawfully assaulting the respondent:—

Held, that the first conviction was a bar to the second.

CASE stated by justices of Cardiganshire under 20 & 21 Vict. c. 43.

At the petty sessions at Aberystwith, on the 26th of June, 1872, a complaint was preferred by the superintendent of police against the appellant, under 5 & 6 Wm. 4, c. 50 (1), s. 78, for that the

(1) 5 & 6 Wm. 4, c. 50, s. 78: . . . "if the driver of any carriage whatsoever, on any part of any highway, shall by negligence or wilful misbehaviour cause any hurt or damage to any person . . . every person so offending . . . for every such offence shall forfeit any sum not exceeding 5*l*."

24 & 25 Vict. c. 100, s. 42: "Where any person shall unlawfully assault or

appellant, on the 15th of June, 1872, being the driver of a certain carriage on a certain highway, called Penpache Road, did then and there, by negligence or wilful misbehaviour, to wit, by striking a certain horse ridden by the now respondent, cause certain hurt and damage to the now respondent, passing on the highway, by causing severe bruises and concussion of the hip-joint.

The appellant was convicted and fined 2*l.*

At the petty sessions at Aberystwith, on the 7th of August, 1872, a complaint was preferred by the respondent against the appellant,, under 24 & 25 Vict. c. 100, s. 42, for that the appellant did, on the 15th of June, 1872, unlawfully assault, strike, and otherwise abuse the respondent.

The appellant was convicted and fined 1*l.*

On the hearing of the last complaint, the justices found as a fact that the appellant did, on the 15th of June, 1872, unlawfully and wilfully strike and push against the horse upon which the respondent was riding, and also against the respondent herself, and caused her to fall from the horse to the ground, whereby she sustained a concussion of the hip-joint.

It was contended on behalf of the appellant, that as he had been convicted of the complaint preferred against him on the 26th of June, he could not be convicted again for what was the same offence.

The question for the Court was whether the appellant, having been convicted on the 26th of June, 1872, under 3 & 4 Wm. 4, c. 50, upon the complaint of the superintendent of police, could again be convicted on the 7th of August, 1872, under 24 & 25 Vict. c. 100, s. 42, upon the complaint of the respondent.

Arthur Charles for the appellant. The appellant was convicted under s. 78 of 3 & 4 Wm. 4, c. 50, and afterwards again convicted

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beat any other person two justices of the peace, upon complaint by and on behalf of the party aggrieved, may hear and determine such offence, and the offender shall upon conviction thereof before them at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs (if ordered) the sum of 5*l.* . . ."

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under s. 42 of 24 & 25 Vict. c. 100, on the same evidence substantially for the same offence; the former conviction for the same fact is a good defence, for the appellant cannot be convicted a second time for the same offence. It is clear that if the appellant had been indicted for the assault, he could have pleaded autrefois convict to the second indictment, and would have been entitled to an acquittal. Can it make any difference that, instead of having been indicted and convicted before a jury, he has been summarily convicted before justices? It cannot, for the matter is res judicata, and the appellant ought not to be twice vexed for the same cause. If the first conviction had been obtained under 24 & 25 Vict. c. 100, s. 42, the appellant would, under s. 45, have been released from all further or other proceedings for the same cause, and he could not have again been convicted under 4 & 5 Wm. 4, c. 50, s. 78. In *Reg.* v. *Elrington* (1), the justices dismissed a complaint for a common asssault, and gave the defendant a certificate, under 9 Geo. 4, c. 31, s. 28, and it was decided that the defendant could not again be proceeded against by indictment for unlawfully wounding, or for an assault causing actual bodily harm, or for a common assault. Cockburn, C.J., said, "It is a fundamental principle that out of the same state of facts a series of prosecutions is not to be allowed." In *Reg.* v. *Walker* (2), a conviction for a common assault was held a bar to an indictment for felonious stabbing in the same transaction; so in *Reg.* v. *Stanton* (3), a conviction for assault was held to bar a charge for an assault and wounding with intent to murder. In *Reg.* v. *Morris* (4), it was held that a conviction for assault by justices in petty sessions was not, either at common law or under 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted. That decision is not applicable to the present case, for different evidence would have to be adduced on the trial of the second charge, and the case was also decided on the special words of the statute. It is laid down in Paley on Convictions, 5th ed. p. 145, and in Broom, Legal Maxims, 3rd ed., p. 312: "The true test by which to decide whether a plea of autrefois acquit is a sufficient bar in any particular case, being whether the evidence necessary to support the

(1) 1 B. & S. 688; 31 L. J. (M.C.) 14.
(2) 2 Moo. & Rob. 446.
(3) Cox C. C. 324.
(4) Law Rep. 1 C. C. 90.

[illegible]

second indictment would have been sufficient to procure a legal conviction in the first." Applying that test to the present case, the appellant ought not to have been convicted a second time.

The respondent did not appear.

BLACKBURN, J. I think the fact that the appellant had been convicted by justices under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of autrefois convict, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, transit in rem judicatam, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence. The only point raised is whether a defence in the nature of a plea of autrefois convict would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a Court of competent jurisdiction, it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury. It is necessary in the present case to have it proved, just as in the case of a defence upon the plea of autrefois convict, that on a former occasion the appellant was charged with the same assault, although not in the same words, yet in terms the same, and that he was then convicted and punished. That is the substantial averment in a plea of autrefois convict. *Reg.* v. *Elrington* (1) and the other cases cited do not apply, for the provisions of s. 28 of 9 Geo. 4, c. 31, which have been re-enacted in 24 & 25 Vict. c. 100, s. 45, go further than the common law, and release a person who has been convicted and paid the fine; or who, being acquitted, has obtained a certificate freeing him from further proceedings, civil or criminal, for the same cause. In this case we must rely upon the common law. It seems that the same identical matter was brought before a competent tribunal and the appellant was convicted and punished for it; I do not

(1) 1 B. & S. 688; 31 L. J. (M.C.) 14.

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know whether serving the punishment makes any difference; but he was convicted and sentenced for it; and therefore he cannot be tried again for the same thing before another tribunal, and the justices who convicted the appellant a second time made a mistake, and the conviction must be quashed.

LUSH, J. I am also of opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of two statutes. The appellant was prosecuted for the assault, and convicted under one of the statutes, 3 & 4 Wm. 4, c. 50, s. 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute.

FIELD, J. I am of the same opinion. The case seems to fall within the principle enunciated in the text books, particularly in Paley on Convictions, 5th ed. p. 145, and Broom, Legal Maxims, 3rd ed. p. 312; and I think the circumstance that this was a conviction under a jurisdiction created by statute does not make any difference in principle. A person cannot be twice punished for the same cause.

Judgment for the appellant.

Attorney for appellant: *R. D. Hughes.*

WILLIS *v.* THORP AND ANOTHER. 1875 *June* 8.

Hosiery Manufacture (Wages) Act, 1874 (37 & 38 *Vict. c.* 48), *s.* 3—*Deduction of Fines from Wages.*

By s. 3 of the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), "If any employer . . . shall deduct directly or indirectly from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, or shall refuse or neglect to pay the same, or any part thereof, in the current coin of the realm, he shall forfeit 5*l.* for every offence."

The plaintiff was in the employment of the defendants, who were hosiery manufacturers, as a hand-frame worker. By the regulations of the factory he was liable to a fine of 8*d.* a day for staying away from work without permission. The plaintiff had been fined for so absenting himself, and the amount was deducted by the defendants from his wages:—

Held, that the deduction of fines from wages was not within s. 3; and the defendants were not liable to a penalty.

APPEAL from the Leicestershire County Court holden at Leicester.

Action to recover a penalty under the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48, s. 3). (1)

The plaintiff was in the employment of the defendants, who are hosiery manufacturers at Leicester. He worked for them at a hand-loom, which is a frame within the meaning of the statutes hereafter referred to, and he was an artificer within those statutes.

The course of business in the hosiery trade, so far as relates to the plaintiff's employment is as follows: The stockings are worked upon in turn by three different workmen, called, respectively, a legger, a footer, and a heeler. When the first has completed his work it is handed over to a second, and from him to a third. The work is paid for by the dozen, according to a price list from time to time agreed upon between the masters and the men.

The plaintiff came into the service of defendants on the 7th of

(1) 37 & 38 Vict. c. 48, s. 3: "If any employer shall bargain to deduct, or shall deduct directly or indirectly, from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm, he shall forfeit a sum of 5*l.* for every offence, to be recovered by the said artificer or any other person suing for the same in the county court in the district where the offence is committed, with full costs of suit."

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July, 1874, and so remained until the 17th of July, when he was taken on permanently as a footer. On that day he signed a book containing rules for the regulation of the workshops. That relating to the plaintiff's work was read over and explained to him.

Rule 3 is as follows:—Machine hands in hosiery department, working steam-power rotary frames, neglecting or staying away from work without permission, will subject themselves to fines at the rate of 2*s.* per day of ten hours; and others working hand frames will, for the like cause, subject themselves to fines at the rate of 8*d.* per day of ten hours.

A copy of these rules was posted in each shop.

The plaintiff worked a hand frame.

On certain days in the week ending the 7th of August, the plaintiff was absent from the workshop. On the 14th of August he came to receive the money due to him from the defendants for work done during the week. This amounted to 1*l.* 12*s.* 6*d.* The defendant John Thorp gave the plaintiff a ticket, shewing such amount, and at the same time told the plaintiff that he would deduct 3*s.* 9*d.* for fines incurred upon the above scale. The plaintiff made no objection to the amount of fines, but stated that any deduction was illegal, and refused to accept the sum offered. He ultimately took the money under protest, and the present action was then brought for the penalty.

The plaintiff stated that the men would not allow the master to put a fresh man into a machine assigned to another until the expiration of a week; and that should the master desire to do so none of the men would go to work at it until that period had elapsed. The plaintiff also stated that he occasionally worked at his trade at home, and claimed the right to do so, so long as he did not absent himself for more than a week.

It was proved by the defendants that at the time of the passing of the Hosiery Manufacture (Wages) Act, 1874, and for many years before, the rent of each frame was deducted from the amount due to the workmen as well as certain other sums known in the trade as "charges," and which were as follows:—

Winding; Lighting; Firing; Needles; Mending.

The nature of these charges is fully explained in *Chawner* v.

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Cummings. (1) In consequence of the Hosiery Manufacture Act, 1874, the whole of these charges were abolished in the defendants' factory, and are now borne by the employer.

The county court judge gave judgment for the plaintiff with costs of suit, but gave leave to the defendants to appeal.

The question for the Court was, whether the defendants have upon the above facts incurred the penalty specified in s. 3.

Benjamin, Q.C. (*Merewether* with him), for the defendants. The defendants are not liable to a penalty under s. 3 of 37 & 38 Vict. c. 48. It was decided in *Chawner* v. *Cummings* (1) that payment otherwise than in money was alone prohibited by the Truck Act (1 & 2 Wm. 4, c. 37), and that deductions from an artificer's wages for frame rent, standing room, and winding were a mere mode of calculating the wages due to the workman, and were not prohibited. The present statute alters the law, and prohibits such deductions. The mischief struck at is, that when the bargain is made between the employer and workmen there shall be no contract for these deductions, and the employer shall pay in the current coin of the realm. The fines are imposed for the regulations of the factory, and on a breach of those regulations, the fine incurred may be deducted from the wages. The master can deduct nothing which does not depend on the will of the workmen; he cannot therefore deduct for things like frame rent or standing; but a fine is a thing which the workman may or may not incur at his will. The Act does not make it illegal for a workman to pay a fine; it is clear that the employer may sue for it. The penalty imposed by s. 3 is for deductions made in respect of "frame rents and standing and other charges;" a fine does not come within these words; "other charges" must be read ejusdem generis with "frame rents and standing."

Cave, for the plaintiff. The defendants have incurred a penalty under s. 3. *Chawner* v. *Cummings* (1) was supported in *Archer* v. *James* (2), and in this last case it was decided that a fine was not a deduction from wages within the Truck Act. There is here an agreement that fines shall be deducted from wages. The case,

(1) 8 Q. B. 311. (2) 2 B. & S. 61; 31 L. J. (Q.B.) 153.

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therefore, is directly within the words of ss. 1, 2. By s. 1 wages are to be paid without any deductions or stoppages of any description. By s. 2 all contracts to stop wages are declared to be illegal; and then comes s. 3, which imposes a penalty on all employers who shall deduct from the wages of any artificer any part of such wages for frame rent and standing or other charges, or who shall refuse or neglect to pay them in the current coin of the realm. Fines are charges within the meaning of s. 3. The case falls within the preamble and s. 3 of the Act.

Benjamin, Q.C., in reply.

BLACKBURN, J. In this case we have to put a construction upon s. 3 of the Hosiery Manufacture (Wages) Act, 1874. According to the cases decided before the passing of the Act in question, the Truck Act (1 & 2 Wm. 4, c. 37) did not apply to deductions made by an employer from the wages of an artificer for frame rent and charges of the same description; but the Hosiery Manufacture (Wages) Act recites that it is desirable to prohibit the letting of frames and machinery in the hosiery manufacture, and the stoppage of wages for frame rents and charges; and then, by s. 1, enacts that in all contracts wages shall be made payable in net, in the current coin of the realm, without any deduction or stoppage whatever. By that section nothing can be clearer than that the contract must be to pay the wages in net, in the current coin of the realm, except in the cases of bad and disputed workmanship. Then s. 2 says all contracts to stop wages, and all contracts for frame rents and charges shall be illegal, null, and void. In the present case the parties have not entered into a contract for the stoppage of wages; what they have agreed to is, that in the case of absence from work or misconduct the artificer shall submit to certain fines, and it would follow that the employer might sue the artificer for these fines. It is, however, quite plain that a contract to deduct fines from the wages would be both within the precise words of s. 2 and within the mischief of the Act: the intention is that parties shall not contract to stop wages. Then comes s. 5, which says no action shall be allowed for any deduction or stoppage of wages, nor for any contract declared illegal. The legislature having declared all contracts to stop

wages and all contracts for frame rents and charges to be illegal and void, apparently did not think that enactment sufficient to prevent the mischief of paying wages by truck, or by goods or tokens, or in any other way than in the current coin of the realm; they therefore by s. 3 enact that if any employer shall bargain to deduct—there is no bargain to deduct here, so that does not apply—or shall deduct, directly or indirectly, from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, he shall forfeit 5*l*. I stop at these words for a moment. The defendants here have distinctly deducted from the plaintiff's wages some money for the payment of fines. That is quite clear. Is that deduction within the words I have just read, "for frame rent and standing and other charges"? Other charges in a general sense might include anything, but when we find the words "other charges" following in immediate connection with "frame rent and standing," I think it must mean other charges ejusdem generis. I do not think that the collateral agreement, by which the parties stipulated that the artificer should pay a fine if he absented himself from his work or misbehaved himself, comes within the words "other charges." Then the section proceeds, "or shall refuse or neglect to pay the same, or any part thereof, in the current coin of the realm." For some little time I paused over these words, because undoubtedly when the defendants said, "We will not pay you these wages," they did in one sense refuse to pay the wages in the current coin of the realm; and I was struck by the words in s. 1, "the full and entire amount of wages . . . shall be payable in net in the current coin of the realm, and not otherwise, and without any deduction or stoppage of any description." I was at first inclined to think that the legislature intended to impose a penalty on all employers who did not pay wages without deduction, but on reflection I think that s. 3 could not apply to the case where the master did not pay because he had not the money, but to those cases where he offered and was willing to pay in goods. If the legislature meant otherwise, they should, in s. 3, have repeated the words "without any deduction or stoppage of any description," which are to be found in s. 1. I am of opinion, therefore, that we must act on the general rule, that when the

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legislature impose a penalty the words imposing it must be clear and distinct. I think that the penalty is imposed only on two things—deducting frame rent, standing, and other charges, and not paying in the current coin of the realm; that is, paying by goods or tokens. With some hesitation I have come to the conclusion that the county court judge was wrong, and that his judgment must be reversed.

MELLOR, J. I entirely concur that our judgment must be for the defendants. Upon looking carefully at the words of the various sections of this Act of Parliament, it would appear that the policy has been to take care that no disadvantage should arise to the workmen out of the relations of master and servant; and as it was the common practice to make deductions from the net wages, the object of the legislature has been to prohibit the employer at his own will or determination to make any deduction whatever from the net wages. The wages are to be paid in full in the current coin of the realm. When you come to examine the second section, it says, "All contracts to stop wages, and all contracts for frame rents and charges between employer and artificers shall be and are hereby declared to be illegal, null, and void." The object of that was to make all these contracts of this kind between master and workmen void on account of some supposed disadvantage in which they placed the workmen. Then comes s. 3: "If the employer shall bargain to deduct or shall deduct directly or indirectly from the wages of any artificer in his employ any part of such wages"—for what? Not for any or every stoppage, but for "frame rent and standing or other charges:" other charges, ejusdem generis, with frame rent and standing. I think, therefore, that the county court judge was wrong.

FIELD, J. I think this penalty is not recoverable. I think, looking at the preamble of the Act which refers to the custom of letting out frames, and also considering the deductions that were made in the hosiery trade, the object of the legislature is to prohibit all such deductions from the workman's wages, so that he might know what the clear sum was that he was to receive at the end of the week's work without being hampered

with the question of frame rent and other charges. Sect. 3 was never intended to apply to the deduction of a fine imposed for non-attendance.

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Judgment for the defendants.

Attorneys for plaintiff: *G. L. P. Eyre & Co., for Heath, Nottingham.*

Attorneys for defendants: *Vizard, Crowder, & Anstie.*

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF GREAT WIGSTON, RESPONDENTS; THE MIDLAND RAILWAY COMPANY, APPELLANTS.

May 27.

Lighting and Watching Rate—Railway—3 & 4 Wm. 4, c. 90, s. 33—"Houses, Buildings, and Property other than Land"—"Land."

By 3 & 4 Wm. 4, c. 90, s. 33, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of this Act (watching and lighting):—

Held, that a line of railway was "land" within the meaning of the section; and was therefore only rateable at the lower rate.

Reg. v. *Neath* (Law Rep. 6 Q. B. 707) followed.

Peto v. *West Ham* (2 E. & E. 144; 28 L. J. (M.C.) 240) discussed.

ON an appeal to the Leicestershire quarter sessions, in which the Midland Railway Company were appellants, and the overseers of the parish of Great Wigston respondents, against a rate for the said parish, the sessions confirmed the rate, subject to a case, of which the following are the material parts:—

The appellants are the owners and occupiers of the Midland Railway, of which 1 mile 1130 yards and 2 miles, 5 furlongs, and 1657 chains are within the respondent parish.

The General Lighting and Watching Act (3 & 4 Wm. 4, c. 90) has been adopted and is in operation in the parish. On the 8th of March, 1873, by a rate duly made for the parish under the provisions of the Act, the appellants were rated in respect of the above two lengths of railway at $1\frac{1}{2}d.$ in the pound.

The appellants were rated on the higher scale at which the

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owners and occupiers of houses, buildings, and property other than land were rated in the parish. (1)

The premises in question consist of, first, a portion of the main line, the longer portion aforesaid; and, secondly, of a portion of a branch line which joins the main line at a point of junction within the parish.

Along the whole length of both portions of railways there are the usual metal rails and sleepers, and at or near to the junction aforesaid, where the width of the railway is greater than at any other part, there are sidings with similar rails and sleepers extending over the whole of the increased area. Both portions of railway are also traversed for about three-fourths of their entire length by iron rods or wires used for working signals, and supported by short posts fixed in the ground at a distance of about fifteen yards from each other.

The following structures built in or fixed to the soil, and used by the appellants for the purposes of the railway are upon a portion of the main line at different points:—

1. Three signal boxes made of wood, each being two storeys in height with the upper storey glazed, and having a slated roof.

2. Twenty-five signal posts with signalling apparatus attached to each, and with iron ladders to eighteen of them, and three connecting platforms where signal posts are grouped.

3. Three large iron standards for pumping water into the appellants' engines.

4. Four small houses or huts for the accommodation of signalmen and others; three of these being of wood and one of brick with a slated roof.

5. A large brick building, with doors, and windows, and massive walls supporting an iron tank, which is fitted with iron pipes, valves, and other apparatus.

6. Seven bridges, the property of the appellants, cross the said portion of main line at different points; three of these, built of brick

(1) By 3 & 4 Wm. 4, c. 90, s. 33, the overseers in making the rate under the Act are to proceed as in a poor-rate: "Provided always, that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at (sic) which the owners and occupiers of land shall be rated at (sic) and pay for the purposes of this Act: . . ."

on solid arches for turnpike or other carriage roads, pass over the line, and four, also of brick, pass under the said portion of line; of these one is for a turnpike road, and the others are used for the passage of cattle.

The railway is supported by massive iron girders where it passes over these bridges.

The said portion of main line runs for about 2300 yards in a cutting and for about 1500 yards on an embankment.

Then followed a similar statement as to structures upon the branch line.

For about fifty yards the portion of branch line runs on brick arches, about thirty feet above the level of the adjacent land, and for about thirty-six yards it runs on iron girders, supported by brick pillars about twenty-seven feet in height, and for about twenty yards on a platform bridge constructed of wood, about thirty feet above the level of the adjacent land.

If the Court shall be of opinion that both the said portions of railway are liable to be rated on the higher scale chargeable by statute, the order of the Court of quarter sessions is to stand.

If the Court shall be of a contrary opinion as to both or either of such portions, then the order of sessions is to be quashed, and by consent a new order is to be made reducing the rate to the sum of $\frac{1}{2}d.$ in the pound upon each portion so dealt with by the Court.

Sir H. James, Q.C., and *Poland* shewed cause for the respondents. They contended that "land" in s. 33 of 3 & 4 Wm. 4, c. 90, was confined to land in its natural state or used for agricultural purposes: *Reg.* v. *Midland Ry. Co.* (1) The case of *Reg.* v. *Neath* (2) is inconsistent with *Peto* v. *West Ham.* (3) In *Reg.* v. *Southwark and Vauxhall Water Co.* (4), the company were rated for the land occupied by the pipes, which could not be other than land.

Wills, Q.C., and *Merewether* for the appellants, contended that the case was concluded by *Reg.* v. *Neath* (2), which is not inconsistent with *Peto* v. *West Ham* (3), in which it is to be ob-

(1) 4 E. & B. 958, at p. 962.
(2) Law Rep. 6 Q. B. 707.
(3) 2 E. & E. 144, at p. 158; 28 L. J. (M.C.) 240.
(4) 6 E. & B. 1003.

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served Erle, J., differed from Lord Campbell, C.J., and Wightman and Crompton, JJ. In *Reg.* v. *Neath*, as reported in the Law Journal (1), Cockburn, C.J., said that "land" could not be confined, as Lord Campbell seemed to think, to mere agricultural land; and that is shewn by Lord Campbell's own decision in *Reg.* v. *Southwark and Vauxhall Water Co.* (2) *Reg.* v. *Midland Ry. Co.* (3) was under a statute with quite different words, and the decision proceeds on the ground that a railway came within the word "works" used in that statute.

BLACKBURN, J. In this case, which undoubtedly is one as to which there is some little difficulty upon the decisions, I have come to the conclusion that the railway is to be rated as "land" at the lower rate and not at the higher rate. There are various little artificial erections upon the ground, such as telegraph-houses and so on, places where the men stand, signal posts, and various things of that sort, and if any question is raised about whether they are auxiliary to the line or not we may have to deal with that hereafter. The question now raised before us is whether or not the line of railway—either the main railway or the branch railway, there is no distinction between them—is rateable as "land" at the lower rate, or as "houses, buildings, and property other than land," at the higher rate; that depends on the construction of the Act (3 & 4 Wm. 4, c. 90, s. 33). I am quite prepared to agree with what was said by Lord Campbell (4), and I have little doubt that the idea in the minds of the legislature when they were passing this Act was this: There are some kinds of property which are so occupied that they derive a considerable enhanced value from the lighting and watching; there are other kinds of property which do not derive so much benefit; and it would be just and equitable to proportion the burden upon those different properties according to the benefit which the property derives from the lighting and watching which the Act is going to impose; and then a rough rule is given in these words, "That owners and occupiers of houses, buildings, and property (other than land) rate-

(1) 40 L. J. (M.C.) at p. 196.
(2) 6 E. & B. 1008.
(3) 4 E. & B. 958.
(4) In *Reg.* v. *Southwark and Vauxhall Water Co.*, 6 E. & B. at p. 1013.

able to the relief of the poor of any such parish shall be rated and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated and pay for the purpose of this Act." Now there are houses, buildings, and property other than "land" in the one class, and there is "land" in the other class; those are the two classes which have been roughly laid down by the legislature, and we have to say which of them this company comes within. Now when we come to look at the cases which have been brought to our notice on the present occasion, we find that in *Reg.* v. *Midland Ry. Co.* (1) the words of the local Act were different; the same general idea had undoubtedly been in the minds of the legislature; but they chose to apply different language, and there they said everything should be rateable, houses, shops, buildings, erections, works, tenements, and hereditaments; the latter words by themselves alone would include everything; and then there comes afterwards what is called an exception, but which in reality is a proviso, that "land" should not be rated. Now, there it was obvious that tenements included land, the enactment took in all real property which would include land; but then land was not to be rated, and in that way "land" was clearly confined to everything different from these very general words, works, buildings, shops, almost everything that could be imagined, and tenements. The land was the only exception, and I think the only sense that could be put upon "land" in that Act, from the context and way in which it is brought in, was land in its natural state; and, accordingly, in *Reg.* v. *Midland Ry. Co.* (1) it was so decided. That case was very soon followed by the case of *Reg.* v. *Southwark and Vauxhall Water Co.* (2), and there the question was whether land occupied by the pipes of a water company which, as usual, were in the sub-soil of the road, was to be rated at the higher or lower rate. There the Court, having the previous case before them, said expressly that in *Reg.* v. *Midland Ry. Co.* (1) the words were different; but in this case they could not consider that the water company, occupying the land with their pipes in the way they did, occupied either a house or a building, they were occupying land, and as such they

(1) 4 E. & B. 958. (2) 6 E. & B. 1008.

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must be rated. Then came *Peto* v. *West Ham* (1), upon which the parish officers in the present case very properly mainly rely, as being very material. In this case the majority of the Court—for Erle, J., dissented—came to the conclusion that the dock covered with water (which was surrounded by warehouses and other things which certainly would be in the nature of buildings), was rateable at the higher rate; and Lord Campbell, C.J., who delivered the judgment, gives, as it seems to me, two reasons for it. In the first place, he says he thinks that the spirit of the decision on the Midland Railway Company's Act should prevail, and that the legislature meant to tax at the higher rate all land in which there had been money invested for commercial purposes on the one side, and on the other side land that still remained for the purpose of agriculture or cultivation, or "vegetation," the word used in the other case. Now if that were the principle on which the judgment went, it would certainly be inconsistent with the *Vauxhall Case* (2), for in no sense of the words that I can see, can it be denied that the occupying the land by putting down the water pipes and thus investing money for commercial purposes was not using the land for purposes of vegetation. But then Lord Campbell gives another reason for the judgment, which is, that the warehouses, jetties, and other things surrounding the dock, and being in the middle of the dock, were to be considered as part of one entire property; they were to be treated as the legislature had in s. 34 directed that the courtyards or gardens attached to a house should be treated, as being a part of the principal building to which they are auxiliary, and on that ground also the judgment was given for the parish. This second ground has no bearing on the present case, but I am inclined to think that it might very well be supported; and I am rather inclined to think I should myself draw the conclusion of fact in a similar case that a dock was to be considered as part of one entire property. But there is a still later case, *Reg.* v. *Neath.* (3) That case I certainly cannot, in the slightest degree, distinguish from the present. In that case the question was whether a portion of the canal which ran through the town

(1) 2 E. & E. 144; 28 L. J. (M.C.) 240.

(2) 6 E. & B. 1008.

(3) Law Rep. 6 Q. B. 707.

of Neath was to be treated as land or was to be treated as houses or buildings. The canal was artificially made, as artificially as a railway. The sides were built of bricks, and the water was brought into it. It is, to my mind, perfectly impossible to deny that, though this canal was occupied as a water way, it was artificially made, and money had been invested for a commercial purpose,—to use Lord Campbell's phrase,—as completely as you could say in the case of the dock. In the present case we have a railway instead of the canal. I think there can be no distinction between the two. I think if this railway were upon level ground in its natural state, it would be exactly as a canal would be when upon level ground, the one would be a water way brought artificially on the ground to carry barges, the other an iron way brought artificially on the ground to carry trains; and if this road happens to be in the one case raised upon aqueducts, or viaducts or embankments in the other, it still remains substantially occupied in the same way. Then comes the question, is that to be considered houses, buildings, and property other than land, or land within the meaning of the Act? Now as to that, the Court, of which Cockburn, C.J., my Brothers Mellor and Lush, and myself were members, on considering the case, came to the conclusion that the canal was to be considered as land: and I think that the reasoning, when looked at clearly, shews that we did, rightly or wrongly, dissent from the idea that "land" in this statute was to be considered as land used for the purpose of agriculture only, and was not to include land upon which there had been anything artificially done and money invested for commercial purposes. A canal can in no way, in my mind, be considered as land in its natural state, and there is money invested in it. That we clearly thought was not the right rule. The Lord Chief Justice goes on to say that the accessories were to follow the same rule. In the Law Journal Report (1), I understand the Lord Chief Justice is reported to have said what he is not distinctly stated in the report in the Law Reports to have said, that he did not agree in thinking that "land" was to be confined to agricultural land. Then I give judgment, in which I express the opinion that I thought that *Peto* v. *West Ham* (2) might be supported upon what was certainly one

(1) 40 L. J. (M.C.) at p. 196. (2) 2 E. & E. 144; 28 L. J. (M.C.) 240.

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ground; it is reported as if I said it was the only ground, but I think that is too strong, I should have said, on one of the grounds it might well be supported; and I certainly intimated then that I thought if it were attempted to be said that "land" meant only agricultural land, that would not do. My Brother Mellor says very nearly the same thing; and my Brother Lush pointedly says, referring to *Reg.* v. *Midland Ry. Co.* (1), "there is nothing in s. 33 of this Act to warrant us in holding that land is confined to agricultural land."

Now it has been argued that we are not bound by the *Neath Case* (2), for this reason, it is said it is in conflict with the *West Ham Case* (3), and if it is in conflict we have to decide which of the two we will follow. .I think it may very well not be in conflict with the *West Ham Case*, because I think that the *West Ham Case* may be considered as supported on one of the two grounds which I have referred to. But supposing that was not so, supposing that we had overruled the *West Ham Case*, we have now to consider which of the two is the best decision; and so looking at it, for the reasons I have already intimated, I think not only is the *Neath Case* (2) the last, but also it is the best. I cannot come to the conclusion that, in considering s. 33 of the Lighting and Watching Act we can say that, in the words "houses, buildings, and property other than land," and "land," the antithesis is between land in its natural state, or in an agricultural state, and land in which any money has been invested for commercial purposes; I think the distinction is between land, which is the general word, and land which has been built upon. Such property is either a house or building, or something which for any reason is not a building,—a house or things ejusdem generis; and I think neither a railway nor a canal could be considered as a building in that sense. For that reason I think we should follow the *Neath Case*, both as being the last and as being, in fact, the best decision of the two; and the result is that the order of the sessions must be amended by reducing the rate.

MELLOR, J. I am of the same opinion. The authority of *Reg.* v. *West Ham* (3) is certainly shaken by the dissent of Erle, J.,

(1) 4 E. & B. 958.
(2) Law Rep. 6 Q. B. 707.
(3) 2 E. & E. 144; 28 L. J. (M.C.) 240.

although, if we had nothing else to guide us, we should be bound to follow the decision of the majority of the Court as then constituted. I think, in construing Acts of Parliament of this sort, which were intended for places where there was a considerable amount of building, new houses, and property of that description, we ought to look carefully at the reason why the legislature made such a marked distinction between houses and buildings and land on imposing this tax; and it seems to me rather to be on those who assert the validity of the rate as imposed on the higher scale to shew that a railway is property analogous to houses and buildings. Although a railway, in respect of its stations and in the immediate approaches to a town, may derive a benefit from the lighting and watching greater than purely agricultural land; yet when you consider the whole course of a railway, how little it is dependent upon any lighting and watching which is ordinarily applied to houses and buildings, I cannot but think that there must be a meaning attached to the word "land" which does not confine it to land simply and purely natural or agricultural; and that, therefore, when you have something which is not a building, then the question is, is it in the nature of a building? I confess I think a railway is not in the nature of a building; I think it is much more in the nature of land, although it may be land artificially used in a sense distinct from that in which you would talk of agricultural or natural land. But it appears to me to come far more properly within the meaning of the word land than of houses and buildings. I think the reasons are all in favour of putting that construction upon s. 33. I think it is the most reasonable construction, independently of the fact that we have already decided a case which I cannot distinguish from the present. I cannot help thinking that if we were acting independently of that case, and we had now to decide the *West Ham Case* (1), the decision at which I have arrived would be the more reasonable decision; I mean, in other words, that the latter case, the *Neath Case* (2), is a more right decision than that in the *West Ham Case*, if they are in conflict, which they are, unless the *West Ham Case* can be distinguished on the grounds which have been suggested. For myself, I do not see very clearly that

(1) 2 E. & E. 144; 28 L. J. (M.C.) 240. (2) Law Rep. 6 Q. B. 707.

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there is a distinction. However, I desire to follow the later, as being the better case of the two.

QUAIN, J. If this question were res integra, I should myself be disposed to follow the decision in the case of *Reg.* v. *West Ham* (1) rather than that in *Reg.* v. *Neath* (2), but I cannot distinguish the present case from the latter case, which is the last case decided unanimously by the full Court. If I felt myself entitled to depart from *Reg.* v. *Neath* (2), I must say I should prefer *Reg.* v. *West Ham* (1), which, as it seems to me, is quite inconsistent with the judgment in *Reg.* v. *Neath.* (2) The real fact is that the *West Ham Case* is not supportable upon the ground that the dock was necessary or subsidiary to the warehouses. It is clear that that was no part of the decision, in my judgment; and I am fortified in that when I find the observation of Crompton J., in the course of the argument, in which he says: "I should have thought that the warehouses were ancillary to the docks, not the docks to the warehouses." (3) It is plain, therefore, that, as far as he was concerned, and he was one of the majority, it is no part of his decision that the docks were ancillary to the warehouses; and so he brought them under the category of houses and buildings.

I start with this proposition, that it is a mistake to apply the rule of ejusdem generis at all to the construction of the statute. If the words had been "houses, buildings and property," and had stopped there, I agree that the rule would be applicable; but the words are "houses, buildings, and property other than land." Therefore you must look at the exception which immediately follows; from which I conclude that every property, whether it be houses and buildings ejusdem generis or not, is included in the word "property," unless it be "land." "Land," of course, cannot mean land in the legal sense, therefore some other meaning must be attached to it. Looking for a rule on the subject where there is so much conflict of authority, and where the statute throws very little light upon it, I confess that the reasons given by Lord Campbell, C.J., in the *West Ham Case* (1) appear to me to give a more sensible rule, and which one can better follow, than any of

(1) 2 E. & E. 144; 28 L. J. (M.C.) 240.

(2) Law Rep. 6 Q. B. 707.

(3) 2 E. & E. at p. 150.

the other authorities which have been cited; because he puts it on the two grounds—what is the distinction which the legislature intended to draw between "houses, buildings, and property other than land" and "land." He says, in the first place, "But, in the enactment to be construed, the legislature appears to have intended to divide land into two classes: one, where capital is invested in it for commercial purposes, and the other, where it remains in its natural state, or is cultivated for agricultural purposes. Generally speaking, the first class might be expected to derive much greater advantages from lighting and watching than the second, and therefore it is to be assessed at a higher rate. The 34th section of 3 & 4 Wm. 4, c. 90, respecting 'gardens,' seems to shew clearly the intention of the legislature, that is, what is accessory to 'houses and buildings' should come within the same category, and that the other category should only comprehend land used for agricultural purposes." (1) Then, further on, he goes on to say: "There is no doubt that a large capital must have been laid out in excavating and puddling the dock and basin and surrounding them with walls. If they had been used for carrying on a manufactory, without any buildings being erected upon them, and without water being introduced into them, they could not possibly have been considered 'land' within the meaning of this section." Now it seems to me that that gives a more intelligible rule than any other case; and that it could scarcely have been intended that in the words "property other than land" a railway was not to be included; because nobody would describe a railway as land except a lawyer in a strictly technical sense. Therefore if I were not bound by the decision in *Reg.* v. *Neath* (2), and I had to choose between the two cases, I should go upon the rule laid down by Lord Campbell, and hold that the railway was property rateable on the higher scale.

Order of sessions quashed, and rate amended.

Attorneys for appellants: *Beale, Marigold, & Beale.*
Attorneys for respondents: *Vizard, Crowder, & Anstie.*

(1) 2 E & E. at p. 157; 28 L. J. (M.C.) at p. 245.
(2) Law Rep. 6 Q. B. 707.

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June 8.

THE COMMERCIAL GAS COMPANY, Appellants; SCOTT, Respondent.

Gasworks Acts, 1847, 1871 (10 *Vict. c.* 15; 34 *&* 35 *Vict. c.* 41, *ss.* 1, 3, 36)—*Metropolis Gas Act*, 1860 (23 *&* 24 *Vict. c.* 125, *s.* 2)—*Penalty for improperly cutting off Supply of Gas—Metropolitan Gas Company subject to Gasworks Clauses Act* 1871 (34 *&* 35 *Vict. c.* 41)—*Effect of Incorporation with a subsequent Act of an Act already incorporated with a previous Act.*

The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36, imposes a penalty whenever the undertakers neglect or refuse to supply gas to any occupier within the limits of the special Act under such pressure as is prescribed:—

Held, that the section applied to a case where the gas company had improperly cut off the supply of gas.

By s. 2 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), the Gasworks Clauses Act, 1847 (10 Vict. c. 15), is incorporated with this Act, and made to apply to the several metropolitan gas companies enumerated; by s. 1 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), "the Gasworks Clauses Act, 1847, and this Act shall be construed together as one Act":—

Held, that the Gasworks Clauses Act, 1871, applied to all the enumerated companies.

Case stated by one of the Metropolitan police magistrates under 20 & 21 Vict. c. 43.

The appellants appeared to a summons taken out by the respondent, which, as amended by consent on the hearing, charged that they on the 12th of December, 1874, in, &c., did unlawfully neglect and refuse to give a supply of gas to the respondent, being an owner of premises within the limits of the special Act entitled to the same, under such pressure as is prescribed, contrary to s. 36 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), which enacts: "Whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to the same, under such pressure as is prescribed, they shall be liable to a penalty not exceeding 40*s.* for each day during which such default continues. . . ."

The respondent occupied premises within the limits of the appellants' special Act, and was entitled to be supplied by them with gas. On the day charged the appellants cut off and thenceforth discontinued the supply of gas to the respondent's premises.

The counsel for the appellants objected that the summons as amended could not be sustained, because, by s. 3 of the Gas-

works Clauses Act, 1871 (34 & 35 Vict. c. 41) (1), the operation of that statute was, as they contended, confined to every gas undertaking "authorized by any special Act hereafter passed;" and therefore that it could not apply to an undertaking like that of the appellants, which was incorporated in the year 1847. It was further contended on the part of the appellants, that s. 36 of the Gasworks Clauses Act, 1871, upon which the amended summons had been framed, did not apply to a case where there had been a total discontinuance by a gas company of a supply of gas to a consumer; but that the words "under such pressure as is prescribed" plainly limited the operation of the clause to a case where the undertakers neglected or refused to give a supply of gas to an owner or occupier within their district "under such pressure" as their special Act prescribed. It was further contended on the part of the appellants that the only penal remedy for a discontinuance of gas was given by s. 17 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), and that the respondent had not made the written application therein required.

It was replied, on the part of the respondent, that s. 1 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), having incorporated the Gasworks Clauses Act, 1847 (10 Vict. c. 15), which latter Act had been incorporated by s. 52 of the appellants' special Act (15 & 16 Vict. c. clv), the provisions of the Gasworks Clauses Act, 1871, were applicable to and binding upon the appellants; and that s. 17 of the Metropolis Gas Act, 1860, did not apply to a discontinuance of gas.

The magistrate was of opinion that the contention on the part of the respondent was right, and convicted the appellants, inflicting a penalty of 10*l.* and costs.

The question for the Court was, whether the appellants were rightly convicted.

W. Williams, Q.C. (with him, *H. Sutton*), for the appellants.

(1) By 34 & 35 Vict. c. 41: "The Gasworks Clauses Act, 1847 (10 Vict. c. 15), and this Act shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act."

By s. 3: "The provisions of this Act shall apply to every gas undertaking authorized by any special Act hereafter passed, ..."

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The Act of 1871 (34 & 35 Vict. c. 41), by s. 3, only applies to new companies.

[LUSH, J. Sect. 1 says the Gasworks Clauses Act, 1847, and this Act shall be construed as one Act, and the provisions of this Act are to supersede such of the provisions of the Act of 1847 as are inconsistent with them. Surely by that the Act of 1847 stands amended not only in the statute book, but in every private Act in which it has been incorporated.

QUAIN, J. Sect. 1 amends the Act of 1847, as incorporated with other Acts, and s. 3 makes the two Acts apply to all future companies without any incorporation being necessary.]

Reg. v. *Smith* (1) decided that when an Act had been incorporated in another Act, the repeal of certain sections of the incorporated Act left them untouched in the Act in which they had been incorporated. That, in principle, is the same as this case. Secondly, s. 36 only imposes a penalty for supplying gas under insufficient pressure, and not for not supplying any gas at all.

Kydd, for the respondent. The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, expressly applies the Act of 1847 to all the London gas companies. (2) Consequently, the Act of 1871, which, by s. 1, is to be read as one with the Act of 1847, and as amending and superseding some of its provisions, must be read in the Act of 1860, which is a public Act. *Reg.* v. *Vine* (3) is a strong case as to the retrospective effect of an Act of Parliament. Secondly, if a gas company neglect to supply gas at all, they neglect to supply gas under the proper pressure.

W. Williams, Q.C., in reply.

LUSH, J. I am of opinion that this conviction is right. The Act of 1847 was a model Act, which was to be applied to all companies and all gasworks authorized by any Act of Parliament which shall declare that the Act shall be incorporated therewith. Then came the Act of 1852 to establish this company, which had

(1) Law Rep. 8 Q. B. 146.

(2) 23 & 24 Vict. c. 125, s. 2: "The Gasworks Act, 1874 (except so far as the provisions thereof are inconsistent with this Act), is incorporated with and forms part of this Act, and shall apply to the several companies before named or referred to" (the appellants' company being one) "as fully as if the gasworks of the several companies were authorized by this Act; . . ."

(3) Ante, p. 195.

a clause incorporating the Act of 1847. So it stood until the year 1860. Then, in the year 1860, there came the general Act (23 & 24 Vict. c. 125), an Act for better regulating the supply of gas to the metropolis, called "The Metropolis Gas Act, 1860," and that Act recited, that the following gas companies—and I believe I am correct in saying it enumerated all the gas companies in London, and the Commercial Company amongst the rest—that those companies having been incorporated by Act of Parliament "for the purpose of supplying several districts of the metropolis with gas; and that they, instead of supplying gas by several mains in the same district, have agreed, as far as possible, each one to confine its supply to a separate district, in order to economise capital and avoid the too frequent opening of the public streets, and subject to the provisions and restrictions of this Act, it is expedient that such districting should receive the sanction of Parliament." Thus Parliament sanctions the monopoly—that is, the appropriation to each company of a special district of its own. And the enactment in s. 2 is: "'The Gasworks Clauses Act, 1847' (except so far as the provisions thereof are inconsistent with this Act), is incorporated with and forms part of this Act, and shall apply to the several companies before named or referred to as fully as if the gasworks of the several companies were authorized by this Act." Therefore from that time the Act of 1847, as amended by the Act of 1860, was directly applied to all the gas companies of the metropolis, this company by name amongst the rest; and consequently the operation of the Act of 1847 upon those companies did not depend upon the incorporating clause of the private Act, but, by virtue of the general enactment in s. 2 of the Act of 1860, it had the same effect as if there had been no incorporating clause in the private Act. Then came the Act of 1871 (34 & 35 Vict. c. 41), which is another model Act, not an Act solely for the particular companies like the Act of 1860, but a model Act for application to any gas company incorporated under an Act of Parliament; and s. 1 says: "The Gasworks Clauses Act, 1847, and this Act, shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act." That of necessity, therefore, takes in the Act of 1860,

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because that took in the Act of 1847, and said the Act of 1847 and the Act of 1860 should be read as one Act. I cannot, therefore, entertain the slightest doubt, that every provision in the Act of 1871 governs all the London gas companies. Indeed it would be an extraordinary thing if it were not so, because that Act was passed to secure a great benefit to the public and advantages to gas companies; and, amongst others, it appointed public examiners, by whom the illuminating power of gas should be tested from time to time, and other regulations. It would be an alarming thing to the inhabitants of the metropolis to find that not one of those provisions—for that would be the consequence if Mr. Williams's argument was to hold good—would be applicable to any part of the metropolis. That being so, the question is, what is the proper construction of s. 36 of the Act of 1871. The company here had laid down and supplied gas to the respondent, and they had cut off the supply of gas without any apparent justification. Are they liable under s. 36? I am clearly of opinion that they are. To understand that section one must go back to s. 11. I should first observe that s. 14 of the Act of 1860 had required the company to supply gas to every person who chose to demand it of them, and whose premises were within a certain distance of the mains, but it provided no remedy in case they did not do it; they could only be sued. Sect. 11 of the Act of 1871 says: "The undertakers shall, upon being required so to do by the owner or occupier of any premises situate within twenty-five yards from any main of the undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises under such pressure in the mains as may be prescribed, and they shall furnish and lay any pipe that may be necessary for such purpose, subject to the conditions following." Then follow conditions about the expense of laying down the pipes. So that the legislature is here reiterating the obligation to supply, but it adds to it: You shall not only supply gas, but shall supply it under the prescribed provisions. Then s. 36 must be read in connection with that: "Whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to the same, under such pressure as is prescribed, they shall be liable to a penalty not exceeding

40s. for each day during which such default continues." That is a cumulative provision, which says in effect: Whereas you were required to supply gas, but there was no penalty for not doing it, we now require you to continue to supply gas, and to supply it under a particular pressure. If you do not do so; if you neglect either part of your duty—that is, either to supply the gas at all, or to supply it at a given pressure—you shall be liable to a penalty. That is the meaning which, I think clearly, that clause bears. It was not confined to the supply under a given pressure, but it is applicable to the neglect to supply gas at all, as well as to the neglect to supply the proper quality. Therefore I am clearly of opinion the magistrate was right.

QUAIN, J. I am of the same opinion. It appeared from the argument of Mr. Williams that the Act of 1847 applied to the defendants in its unamended form by virtue of the special Act; but the moment that argument was displaced, it appeared to me there was an end of the whole case; and that it was displaced is clear from the Act of 1860. The Act of 1847 was to be applied only to such companies as had any incorporating clause, and accordingly it only applied to those companies who shewed in that way that they incorporated it. But the policy of the legislature has since changed, and now those general provisions are applied by the legislature themselves to all companies. Thus we have an express provision in the Act of 1860 that the Act of 1847, as altered or modified by that Act, should apply to all the metropolitan gas companies, although that Act was passed in 1860, and the private Act of the present company was passed in 1850. We have, therefore, by virtue of the public Act itself, the provisions of the Act of 1847 applied to this very company. Now what does the Act of 1871 do? As I read it, first, by s. 1, it in effect provides that, instead of the Act of 1847, the Act of 1847, as modified by this Act, shall apply to this company, being one of those to which it had been made to apply by the Act of 1860. And then, by s. 3, it shall apply to all future companies, whether those future companies contain a clause incorporating the public Acts or not. This must be so, when you consider that the Act of 1847 already applied to all these metropolitan companies, and all this Act says is, that that Act of 1847 shall be altered or

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modified by this Act, which is in effect saying the Act of 1847, as modified by this Act, shall apply to all those companies to which, by the Act of 1860, that Act of 1847 applied. It seems to me, then, to be perfectly clear, by virtue of s. 1 of the Act of 1871, the 36th section of that Act is applicable to the appellant company, and the magistrate has properly allowed the summons to be amended, and has properly convicted the company. I have no doubt that, reading s. 11 as my Brother Lush has just done, it does apply to this case as stated by the magistrate, and that this conviction was a very proper one.

Judgment for the respondent.

Attorneys for appellants: *Hollams, Son, & Coward.*
Attorney for respondent: *H. B. Roberts.*

June 18.

[IN THE EXCHEQUER CHAMBER.]

SIMPSON AND ANOTHER *v.* HENNING.

Debtor and Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 126 *and* 127—*Composition in Respect of Joint Debts no Satisfaction of a separate Debt.*

1 Ex. D. 410
2 C. & D. 319
19 Ch. D. 462
8 Q. B. D. 600, 9

The plaintiffs, being the holders of a joint and several promissory note of the defendant and H., sued the defendant on the note. The defendant pleaded that the note was given by him and H. to the plaintiffs on account of a partnership debt; and that afterwards the defendant and H., as partners, being unable to pay their debts, instituted proceedings, which took place under ss. 126 and 127 of the Bankruptcy Act, 1869, according to the forms given in the schedule to the Act as provided by rule 252; and, thereupon, an extraordinary resolution of the creditors of the defendant and H. that a composition of 8*s.* 6*d.* in the pound, payable by instalments, should be accepted in satisfaction of the debts due from them to their creditors was passed; that the provisions of the composition became binding on the plaintiffs and on all the creditors of the defendant and H., and that the debts due to the plaintiffs and to all other creditors became and were satisfied within the meaning of ss. 126 and 127 of the Bankruptcy Act, 1869:—

Held, on demurrer, affirming the judgment of the Court below (by Brett and Archibald, JJ., and Pollock and Amphlett, BB.; Kelly, C.B., dissenting) that the acceptance of a composition on the joint debt under s. 126 was not a satisfaction of the defendant's separate liability, and, therefore, that the plea was bad.

ERROR from the judgment of the Lord Mayor's Court in favour of the plaintiffs. (1)

3 C. P. D. 490

(1) The record was brought into this Court through the Court of Queen's Bench, which, it appeared on inquiry, had been the practice in the absence of

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Declaration upon a concessit solvere for 50*l.*

Plea, as to the sum of 27*l.* 16*s.* 10*d.* parcel, &c., that the sum of 27*l.* 16*s.* 10*d.* is parcel of the amount of a certain promissory note bearing date the 11th of January, 1873, whereby the defendant and one H. C. Henning jointly and severally promised to pay to the plaintiffs one month after date the sum of 134*l.* 7*s.* 9*d.*, which note had been given by the defendant and H. C. Henning to and accepted and received by the plaintiffs for and on account of the amount of the note due from the defendant and H. C. Henning, as co-partners in their business of builders, to the plaintiffs, and which note was overdue and payable and had been paid by the defendant and H. C. Henning to the plaintiffs, with the exception of 27*l.* 16*s.* 10*d.*, parcel of the amount of the note which remained due and owing and unpaid by the defendant and H. C. Henning to the plaintiffs, and the defendant never was indebted to the plaintiffs in respect of the sum of 27*l.* 16*s.* 10*d.*, except as aforesaid; that afterwards, and after the making and passing of the Bankruptcy Act, 1869, and after the commencement of the Act, the defendant and H. C. Henning being such co-partners, debtors unable to pay their debts in their business to divers creditors, including the plaintiffs in respect of the debt of 27*l.* 16*s.* 10*d.*, duly instituted the proceedings which afterwards duly took place under ss. 126 and 127 (1) of the Act by petition and affidavit

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rules under the Act (20 & 21 Vict. c. clvii. ss. 4, 45), saying how the error was to be brought from the Mayor's Court. See the judgment of Amphlett, B., post, p. 410.

(1) 32 & 33 Vict. c. 71, s. 126. "The creditors of a debtor unable to pay his debts may without any proceedings in bankruptcy by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. An extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner. . . .

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and if satisfied that it has been so passed, he shall forthwith register the resolution and statement

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thereto annexed, according to the forms given in the schedule to the Act as provided for by the 252nd rule of the General Rules made in pursuance of the Act; and thereupon an extraordinary resolution of such creditors of the defendant and H. C. Henning as such debtors within the true intent and meaning of the Act, that a composition should be accepted in satisfaction of the debts due from them as such debtors to their creditors, was duly passed within the true intent and meaning of s. 126, which resolution is as follows:—1. That a composition of 8*s.* 6*d.* in the pound shall be accepted in satisfaction of the debts due to the creditors from C. Henning and H. C. Henning. 2. That such composition be payable as follows: 2*s.* 6*d.* in the pound within two months from the confirmation of this resolution; 2*s.* 6*d.* in the pound within four months from that date; 2*s.* 6*d.* in the pound within eight months from that date; and 1*s.* in the pound within twelve months from that date. 3. That the security of A. Judd and J. James be accepted for the first three instalments of the composition, such security to be by joint and several promissory notes of the debtors and the sureties, and that the last instalment of the composition be secured by the joint and several promissory notes of the debtors. 4. That F. B. Smart be appointed trustee in the matter, and that the promissory notes be handed to the trustee on or before the 15th

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of assets and debts, but until such registration has taken place such resolution shall be of no validity. . . .

"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in a statement of the debtor produced to the meetings at which the resolution has passed, but shall affect or prejudice the rights of any other creditors. . . .

"If it appears to the Court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

Sect. 127: "The registration by the registrar . . . of an extraordinary resolution of the creditors on the occasion of a composition under the seventh part of this Act, shall, in the absence of fraud, be conclusive evidence that such resolutions were duly passed and all the requisitions of this Act in respect of such resolutions complied with."

Rule 252: "Proceedings under these sections (ss. 125 and 126) shall be instituted by the debtor by petition and affidavit thereto annexed according to the forms given in the schedule."

day of November, 1873, and that the costs, charges, and expenses of Messrs. Smart, Snell, & Co. (including the charging of F. B. Smart as trustee), 31*l.* 10*s.*, be paid by the debtors on or before the 15th of November, 1873; that all conditions precedent to render the resolutions binding on all the creditors, including the plaintiffs, were performed, and that all conditions precedent, required by the extraordinary resolutions to be performed to render the composition a satisfaction, within ss. 125 and 126 of the Act, of all debts due from the defendant and H. C. Henning as such debtors to their creditors, were performed; and that before this suit the provisions of the composition became binding on the plaintiffs and the other creditors of the defendant and H. C. Henning, and the debt due to the plaintiffs and the debts due to the other creditors became and were duly satisfied by the composition within the true intent and meaning of ss. 126 and 127.

Replication, that the composition was made payable in respect of the joint debts only of the debtors, and was intended to be and was accepted by the creditors of the debtors in satisfaction of the joint debts, and not of the several debts of the debtors; and that the separate creditors of the debtors were not parties to the proceedings under the Bankruptcy Act, 1869, in the plea mentioned, and never agreed to accept the composition, and at the time when the composition was accepted, as in the plea mentioned, it was agreed that the separate estates of the debtors should remain liable to the payment in full of their several debts, and that the payment of the composition should not prejudice the right of the plaintiffs to proceed against either of the debtors in respect of their several liability to the plaintiffs.

Demurrer to the plea, and joinder in demurrer.

Demurrer to the replication, and joinder in demurrer.

Judgment that the plea was bad and the replication good.

On error,

May 10. *J. Brown, Q.C.* (*Anderson* with him) for the defendant

R. V. Williams, for the plaintiffs.

The arguments and the cases cited appear in the judgments.

Cur. adv. vult.

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June 18. The following judgments were delivered:—

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AMPHLETT, B. This is an appeal against a judgment in the Lord Mayor's Court, allowing a demurrer to one of the defendant's pleas in this action.

Ante 407 n.

Upon the case coming on before this Court in the sittings in error after last Hilary Term, an objection to the jurisdiction was raised by Mr. Williams for the plaintiffs, on the ground that no rules had been made for regulating appeals from the Lord Mayor's Court, as appeared to have been contemplated by the Lord Mayor's Court Act, and the case was accordingly ordered to stand over for inquiry as to the practice. The result of that inquiry was to shew that such appeals have been frequently entertained, and Mr. Williams having abandoned his objection to the jurisdiction, the case was argued before us on the merits at the last sittings.

The plaintiffs' demand in the action was for a debt of 50*l.*, and the third plea, the validity of which is now in question, was to the effect that, as to 27*l.* 16*s.* 10*d.*, parcel of the said debt, it was the balance remaining due on a joint and several promissory note of the defendant and one H. C. Henning, carrying on business in co-partnership, for the sum of 134*l.* 7*s.* 9*d.*, to secure a partnership debt of that amount due from them to the plaintiffs, and that the defendant and the said H. C. Henning, being as such co-partners debtors unable to pay their debts in their said business, duly instituted proceedings, under ss. 126 and 127 of the Bankruptcy Act, 1869, and that thereupon an extraordinary resolution of such creditors, within the true intent and meaning of s. 126, was passed for accepting a composition of 8*s.* 6*d.* in the pound, in satisfaction of the debts due to the creditors of the defendant and the said H. C. Henning, payable by four instalments, as therein mentioned, of which the three first were to be secured by the joint and several promissory notes of the debtors and two sureties, and the last by the joint and several promissory notes of the debtors. And the plea contained the usual averments that all requirements of the statute had been complied with.

It was assumed in the argument before us by both sides, and, I think, correctly, that the resolution mentioned in the plea was come to at a meeting of joint creditors only, as authorized by

r. 285 (1) of the general rules made in pursuance of the Bankruptcy Act, 1869, and that from the absence of any averment to the contrary, it must be assumed against the pleader that the plaintiffs were not parties to the resolution, and had not adopted or received any instalment in respect of their debt under it.

To this plea there was a demurrer, and the Court below held that plea bad. There was also a special replication to the plea, which was demurred to by the defendant, and the replication was held good. Error was assigned by the defendant in respect of both these decisions, but it was admitted by Mr. Brown that he could not sustain the demurrer to the replication.

The only question, therefore, for our decision is, whether the Court below was right or wrong in allowing the demurrer to the plea, or, in other words, whether such plea does or does not afford an answer to the action, so far as relates to the partnership debt of 27*l.* 16*s.* 10*d.*, to which alone it relates. This question depends upon the true construction of s. 126 of the Act, taken in connec-

(1) Rule 285: "In cases of proceedings for liquidation by arrangement, or composition instituted by partners, separate meetings of the different classes of creditors shall be held, thus: if the partnership consists of A., B., and C., a meeting of the joint creditors of A., B., and C. shall be first held, and separate meetings of the separate creditors of A. B. and C. shall be held at a date or time subsequent to the meeting of the partnership creditors. The joint creditors may come to such resolution as they shall think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but in the event of their determining upon his bankruptcy or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or shall be appointed by the joint or partnership creditors, but they may appoint a committee of inspection from their own body, if they think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of such debtor agreeing to accept a composition in cases where the joint creditors have resolved upon a liquidation by arrangement, the assets of such separate debtor shall be made available by the trustee for or towards the payment thereof, in such manner as the Court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee after the payment of a provision for such composition, and all proper costs incurred in connection therewith, shall be deemed partnership assets. If in any such case the separate debtor shall be a member of more than one firm, the surplus of his separate estate shall be applied in such manner as the Court shall direct."

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tion with the 285th rule, which, as will be seen, is more directly applicable to the case than the section itself.

Now, before the resolution for a composition was passed, there can be no doubt that, although in its origin a joint debt only, this partnership debt became, by virtue of the promissory note, a joint and several debt, for which the plaintiffs might have sued both partners together, or either separately, as they thought fit; and it is now settled that in case of bankruptcy they would not have been put to their election as under the old law, but might, by virtue of s. 37 of the Act of 1869, have proved the debt against both the joint and the separate estates of the bankrupts, and received equal dividends therefrom with the creditors of each estate, until 20*s.* in the pound had been realized. See *Ex parte Honey* (1), and *Ex parte Stone.* (2) But it was argued on behalf of the defendant that the rights of the plaintiffs either to sue the partners separately, or, in case of bankruptcy, to prove against their separate estates, was altogether destroyed by the resolution come to by a statutory majority of the joint creditors to accept a composition in satisfaction of the joint debts; and it was asked how it was possible there could be a right to sue on a note given only as a security for a joint debt which had been satisfied.

The validity of this argument depends upon the sense in which, under s. 126, the composition is said to be accepted in satisfaction of the debts. If it is to be taken to mean a complete and absolute satisfaction, the argument would be unanswerable. But I think it is clear that it must be taken at least with some limitation, for it is now conclusively settled by authority that, notwithstanding some difficulty from the vague and not altogether consistent use of the word bankruptcy in different parts of the Act, proceedings for liquidation by arrangement or composition under ss. 125 and 126 of the Act are "proceedings in bankruptcy;" and that the general enactments in the earlier sections of the Act, such for instance as s. 50, which preserves the rights of creditors against co-debtors and sureties, are to be read as applicable to proceedings under ss. 125 and 126: see *Megrath* v. *Gray* (3), where the whole matter is

(1) Law Rep. 7 Ch. Ap. 178. (2) Law Rep. 8 Ch. Ap. 914.
(3) Law Rep. 9 C. P. 216.

elaborately discussed in an unanimous judgment of a full Court, delivered by Lord Coleridge, C.J.; and it was decided that a composition accepted under s. 126, although unaccompanied by any reservation of right against other parties, and although in that case actually concurred in by the individual creditor suing, did not operate as a release of a co-debtor or surety. It is true that in *Wilson* v. *Lloyd* (1), the chief judge held that a surety was discharged by the creditor himself voting in favour of a resolution; but in *Ex parte Jacobs* (2), the Lords Justices disapproved of *Wilson* v. *Lloyd* (1) in that respect, and pointedly expressed their agreement with the decision of *Megrath* v. *Gray* (3), and the reasons given for it in the Court of Common Pleas. I may also observe that, even if the decision in *Wilson* v. *Lloyd* (1) is not to be taken as overruled, it was founded upon the fact (which does not exist in the present case) of the creditor having himself voted for the resolution. The decision of *Ellis* v. *Wilmot* (4), points in the same direction, though the resolution there being under s. 125, and not s. 126, it does not apply so closely to the present case as the other authorities I have mentioned. So also in the case of *Andrew* v. *Macklin* (5), it was held that a composition deed under the former Bankruptcy Act of 1861, executed by the statutory number of creditors, and containing a release which was declared by s. 192 of that Act to be as binding on all the creditors as if they had all executed the same, did not release co-debtors.

It may be said that, in the cases to which I have hitherto referred, the co-debtors or sureties were different persons from the bankrupts; but I did not understand Mr. Brown, in his able argument before us, to contend that the plaintiffs would be debarred of their rights against the separate partners, unless they would under the same circumstances, be barred (as according to his contention they would be), as against an independent co-debtor or surety; and, at all events, I am of opinion that no such distinction between the two cases can be maintained. Where, as in this case, the original debt was a partnership debt, and the joint and several note was given as a security, it appears to me that the true

(1) Law Rep. 16 Eq. 60.
(2) Law Rep. 10 Ch. Ap. 211.
(3) Law Rep. 9 C. P. 216.
(4) Law Rep. 10 Ex. 10.
(5) 6 B. & S. 201; 34 L. J. (Q.B.) 89.

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position of partners in respect of their separate liability may be considered analogous to that of a surety, and I fail to understand why a composition in bankruptcy in respect of the joint estate should release them from their separate liability, which would not have that effect as regards an independent surety. But without resting too much on that analogy, it may be observed that, according to the reasoning in *Megrath* v. *Gray* (1), not only s. 50, with which the Court then had to deal, but the other four general enactments, including, as I should suppose, s. 37, which gives a right to prove on both the joint and separate estates, are to be taken as applicable to proceedings under s. 126; and if that is so, there seems to me to be a necessity that the satisfaction of the debts spoken of in that section should be taken in a limited sense in both cases; the injustice that any other construction would work is alike in both cases, and where there are two possible constructions of an Act of Parliament that circumstance is not to be altogether put out of consideration. No one could deny that it would,—to adopt the language of Cockburn, C.J., in *Andrew* v. *Macklin* (2),—be a monstrous consequence, that the resolution of the statutable majority of creditors to accept a composition should deprive a dissentient creditor of his rights against, it may be, a solvent co-debtor or surety; but would it be less unjust and unreasonable to give the power to a statutable majority of joint creditors to deprive a dissentient joint creditor, who happens also to be a separate creditor, of his common law, and, under the present bankrupt law, his statutable right against the separate debtors? Suppose, for instance, that the joint estate would only pay 1*s.* while the dividends on the two separate estates would, together, amount to 20*s.* in the pound; it would be competent, according to the argument addressed to us on behalf of the defendant, for the statutory majority of joint creditors, by accepting a small composition of perhaps 1*s.* in the pound, to force a dissentient joint and separate creditor to forego his rights against the separate debtors or their estates, which, as to him, would be solvent. It is hardly possible to conceive a greater injustice. The only just principle on which a majority ought to be allowed to bind a minority is, that where the interests of all are identical, there is a reasonable presumption

(1) Law Rep. 9 C. P. 216. (2) 6 B. & S. 201; 34 L. J. (Q.B.) 89.

that the majority are right; but that principle in the case supposed is violated, and the majority which is to bind the plaintiffs might have no interest whatever in the separate estates of the partners, from which, by their votes, the plaintiffs who have such interest are sought to be excluded. But then it was suggested that the true remedy for the flagrant injustice I have mentioned was to be found in the last clause of s. 126, which authorizes the Bankruptcy Court, if the composition cannot proceed without injustice, to adjudge the debtor a bankrupt in the strict sense of the term. In my opinion, however, that clause is not applicable to the case. The injustice I have spoken of does not arise from any special or unforeseen cause, but would be common to all partnership cases falling within the 285th rule, except the very few where there should happen to be no creditor with a right to double proof. Thus, if the argument on the part of the defendant is right, the Court would be compelled in the great majority of partnership cases to adjudge the partners bankrupts, as the only mode of doing justice to (perhaps, as in the present case) a joint and separate creditor for a very small amount, and thus deprive the bankrupts and their other creditors of the power, sometimes very valuable, of agreeing upon a composition. But, again, suppose in the present case there had been a surety other than the bankrupts, what would be his position if the acceptance of a composition was held to release the partners from their separate liability, but not himself? Why, he would be told that he was not released because the satisfaction mentioned in s. 126 was limited, and if he paid the debt and came to be reimbursed by the principal debtors, he would be told that he had lost his right to have recourse to the separate debtors, because the satisfaction of the debt by the contract was unlimited. The strange position of the unhappy surety which this view presents, has, I must confess, to my mind the force of a reductio ad absurdum, and shews conclusively that, if a limited construction is adopted in one case, it must be also adopted in the other.

The case which was cited of *Ex parte Manchester and Liverpool District Bank* (1) is also, I think, a strong authority in favour of the plaintiffs' contention. There the bank were joint creditors of

(1) Law Rep. 18 Eq. 249.

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two persons in co-partnership, with a security by deposit of deeds upon the separate property of one. At a meeting of the joint creditors under s. 126 a resolution was passed by the statutory majority that a composition of 10*s.* in the pound should be accepted in satisfaction of the debts, and the bank signed that resolution. The question was raised, whether the passing of the resolution did not discharge the bank's debt, and in consequence the separate security? There were other points in the case which need not here be referred to, but the Chief Judge gave an unhesitating opinion that the separate security remained good, and that a deed which had been executed to carry out the resolution, therefore, rightly reserved such security, though no such reservation was expressed in the resolution. So far as the point in discussion is concerned, there appears to be no difference between that case and the present, except that in the former the separate security was by a deposit of deeds, while in the latter it is by a personal contract. But how can that affect the question, if the defendant's contention is right, that the resolution operates as a complete and absolute satisfaction of the debt? If this were so every security for the satisfied debt, whether real or personal, would surely also be discharged.

But, further, I think that without the aid of the decisions respecting co-debtors and sureties to which I have referred, there is the following separate and independent ground for holding that the plaintiffs are entitled to maintain their action. Section 126 does not by itself apply to the present case. No separation of the interests of joint and separate creditors is contemplated in that section, and I apprehend that if that section stood alone no resolution for a composition would be binding upon dissentient creditors which was not passed by a statutory majority of all the creditors without distinction, and which did not make provision for a fair composition to all. That was the law with respect to composition deeds under the Act of 1861: see *Ex parte Glen* (1) and *Tomlin* v. *Dutton* (2); and there is nothing that I can see in s. 126 of the Act of 1869, taken by itself, to alter that law. The power, however, of the joint creditors to act alone is given to them by the 285th rule, and it is to that rule, therefore, taken, of

(1) Law Rep. 2 Ch. Ap. 670. (2) Law Rep. 3 Q. B. 466.

course, in connection with s. 126, that we must look to ascertain the extent of the power. 1875

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Now the scheme of the rule appears to me to be very plain. It was to constitute, as far as possible, the joint and separate estates distinct estates, and to enable the joint creditors to deal with the joint estates on which they had the primary claim, and the respective separate creditors to deal with the separate estates on which they had the primary claim, without the necessity, which, but for the rule, would have existed, of consulting the creditors who only had at most a secondary interest. Under these circumstances, I am disposed to think that the case resembles that of two estates representing distinct trades carried on by the same parties, which is one of the exceptions in bankruptcy, even under the old law, to the rule against double proofs. I do not think it necessary, however, to express a decided opinion on that point, because if the plaintiffs were not allowed to treat themselves both as joint and separate creditors, and to attend the meetings of each class, I think that they necessarily had a right to elect for themselves whether they should rank as joint or as several creditors, and they have made that election by bringing this action. If they should not recover 20s. in the pound in the action, the Court of Bankruptcy will be the proper tribunal for determining whether they have or not also the right to share in the composition. It was pointed out in the course of the argument that some hardship and inconvenience might result from allowing the present action to proceed, as the plaintiffs might take out execution against the defendant's share of the joint estate for which a composition has been paid. That would, however, be no answer at law to the action if the debt is not discharged, and, moreover, the defendant would at all times have the remedy in his own hands by applying to the Court of Bankruptcy for an injunction under the 260th rule, and the Court would either grant an injunction to stay the action and proceed to liquidate the separate estate in bankruptcy, or allow the action to proceed upon such terms, if any, as may be thought right. For these reasons I am of opinion that the demurrer was properly allowed, and that the appeal ought to be dismissed.

My Brothers Brett, Archibald, and Pollock concur in this judgment.

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KELLY, C.B. I am of opinion that the judgment of the Court below was wrong, and ought to be overruled. The plaintiff declared upon a concessit solvere for 50*l.* The defendant, by his third plea, as to the sum of 27*l.* 16*s.* 10*d.* parcel, &c., alleged that it was part of the amount of a promissory note, whereby the defendant and H. C. Henning jointly and severally promised to pay to the plaintiffs 134*l.* 7*s.* 9*d.*, and that the note was given by the defendant and the said H. C. Henning to and received by the plaintiffs on account of an amount due from the defendant and the said H. C. Henning, as co-partners, to the plaintiffs. The plea then alleged that the defendant and H. C. Henning, being, as such co-partners, unable to pay their debts, instituted proceedings under ss. 126 and 127 of the Bankruptcy Act, 1869, by petition and affidavit, according to the forms given in the schedule to the Act as provided by the 252nd of the general rules, and thereupon an extraordinary resolution of such creditors of the defendant and H. C. Henning was passed, that a composition of 8*s.* 6*d.* in the pound should be accepted in satisfaction of the debt due to the creditors from the defendant and H. C. Henning, and that the same should be secured by the joint and several promissory notes of the debtors and two sureties, and that all conditions had been performed to make the composition binding under the provisions of the Bankruptcy Act relating to composition.

It was conceded in argument by the plaintiffs that, apart from the Bankruptcy Act, the plaintiffs being the holders of a joint and several promissory note, and having accepted a composition in satisfaction of the joint and partnership debt from the partnership, could not subsequently sue one of the joint makers of the note upon his separate promise to pay, the acceptance of the composition operating as a satisfaction and extinction of the debt. The law upon the subject was fully considered and so acted upon in *Nicholson* v. *Revill.* (1) It was contended, however, that the effect of a composition under the Bankruptcy Act was different, and operated as a discharge only pro tanto, leaving the right of the creditor upon the several liability of each debtor untouched.

The Bankruptcy Act, 1869, provides for three different modes of dealing with debtors who are unable to pay their debts: by

(1) 4 A. & E. 675.

bankruptcy; by liquidation by arrangement; and by composition. Under the first two of these a trustee is appointed, in whom the property of the debtor vests, and who is to distribute it according to the bankrupt law. In the case of a composition no trustee is appointed, and the debtor does not give up his property, unless it be so specially provided by the deed of composition. The composition is to be accepted and carried out by an extraordinary resolution, which is provided for by s. 126, and must be agreed to by a majority in number and three-fourths in value of the creditors; and the provisions of a composition deed, when accepted, were declared to be binding on all the creditors whose names and addresses and the amount of whose debts are shewn in the statement of the debtor produced to the meeting at which the resolution was passed. When these steps are duly taken, and a composition is agreed to, it appears to me that the consequences which follow are the same as in the case of a composition at common law. With regard to the creditors who are present, it is open to them to make any stipulation, as to the reservation of rights or otherwise, that the debtor will assent to. There is a provision at the close of s. 126, which would meet the case of any special hardship or inequality, whereby it is provided that if it appears to the Court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly. And I see nothing unjust in the substance of the provision itself. If, while the joint or co-partnership property be small, or the composition falls short of the full amount of the debts, one of the co-partners has a separate estate of large amount, and is able to pay the debt or debts in full, no creditor would agree to the composition, inasmuch as he might sue the co-partnership to judgment and obtain full satisfaction by issuing execution against the solvent partner.

Our attention was called by Mr. Williams, who argued for the defendant, to rule 285 of the general rules made under the Bankruptcy Act, 1869, which provides, in cases of proceedings for liquidation by arrangement or composition instituted by partners, that separate meetings of the different classes of creditors shall be

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held, whereat the joint creditors may come to such resolution as they may think fit with regard to the joint estate, and the separate creditors may do the like as to the estate of their individual debtor. In cases of liquidation, where the whole property of the debtor or debtors is given up to the trustee, it may be necessary or expedient to distinguish between the joint estates and the separate estates, and to resort to the one or the other, or to both, as far as the Act permits and the interests of the creditors may require. But in cases of composition, the partnership property, as before observed, is not given up, and cannot, when a composition is accepted, be touched. And the Act confers no power whatever to a creditor to bring any action at all, or resort in any way to either the joint or separate estate. It does not appear that any meeting was held of the separate creditors; but whether it was or not, no right of action by means of any such meeting or otherwise is given to a creditor against the separate debtors.

We were also referred to the case of *Ex parte Honey* (1), in which it was held that the holder of a joint and several note signed by two members of a firm could prove against the joint estate of the firm, and also against the separate estates of the two partners who signed the note; and also to that of *Ex parte Stone* (2), in which the same principle was acted on in the case of a joint and several covenant. Both these decisions arose in bankruptcy and proceeded upon the express provision of the Bankruptcy Act, and have no relation to the case of a composition. The case of the *Manchester and Liverpool District Banking Co.* (3) was also cited for the plaintiffs. This was a case of composition by partners, and at the meeting of joint creditors the banking company attended and proved their debt by an affidavit, which disclosed that they were not merely creditors of the firm, but also held as security a deposit of the title deeds of the separate property of one member, and upon this a solicitor was directed to prepare a deed of composition. A deed was accordingly prepared, whereby the security upon the separate estate so held was not to be prejudiced by the composition. But these cases, and the cases of *Megrath* v. *Gray* and *Gray* v. *Megrath* (4), were cases in

(1) Law Rep. 7 Ch. Ap. 178.
(2) Law Rep. 8 Ch. Ap. 914.
(3) Law Rep. 18 Eq. 249.
(4) Law Rep. 9 C. P. 216.

which the liabilities of co-debtors with the partners, or of sureties, or of collateral securities were in question; and in none of them, nor in any case decided, either under the Bankruptcy Act or at common law, has it ever been held that a right of action exists against a joint debtor upon a separate promise, when a composition in satisfaction of the joint debt has been agreed upon and accepted.

This case, when carefully considered, presents no question of the rights of creditors against either a joint estate or a separate estate, because in the case of a composition it is not the estate of the debtor or debtors that is resorted to at all; on the contrary, the estate, whether joint or separate, or both, remains with the debtor or debtors, and the creditors accept the composition in satisfaction of the debt. The substance of the case is, that by the Bankruptcy Act a composition deed is made binding upon the creditors, whether absent or present, and whether it be assented to or not, if resolved upon by the competent majority. And there is nothing whatever in the Bankruptcy Act, and no rule or principle in the common law establishing any distinction between the legal effect and consequences of a composition deed entered into voluntarily by a body of creditors at the common law, and a composition deed under the Bankruptcy Act. It appears to me, therefore, that to decide in this case that a right of action exists, notwithstanding the composition deed, upon the separate promise of one of the debtors is neither more nor less than to make the law, and not to declare it, and that, by interpolating in the Act of Parliament a provision to that effect which it does not in fact contain.

Upon these grounds I am of opinion that the judgment should be reversed.

Judgment affirmed.

Attorneys for plaintiffs: *Simpson & Cullingford.*
Attorneys for defendant: *H. C. Nisbet, Rooke, & Daw.*

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June 7.

SMITH AND ANOTHER, APPELLANTS; THE OVERSEERS OF SEGHILL, RESPONDENTS.

Construction of s. 19 *of Poor-rate Assessment and Collection Act,* 1869 (32 & 33 *Vict. c.* 41)—*Occupation as Tenant.*

S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house was vacant the owners would call upon a married man to go into it; if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work. The employers of S. did not compound for their rates under 32 & 33 Vict. c. 41, but paid upon the full amount, and were rated to the poor as occupiers of the houses. The overseers of the township in which S.'s house was situate were summoned before justices for that they had negligently omitted to enter the name of S. in the occupier's column of the rate-book, contrary to 32 & 33 Vict. c. 41, s. 19:—

Held, 1. Upon the authority of *Hughes* v. *Overseers of Chatham* (5 M. & G. 54), that the occupation by S. was not that of a servant but that of a tenant. 2. That s. 19 of 32 & 33 Vict. c. 41, was not confined to the cases mentioned in ss. 3 and 4, but was of general application, and that S. was entitled to have his name entered in the occupier's column of the rate-book.

Cross v. *Alsop* (Law Rep. 6 C. P. 315) commented upon.

CASE stated by justices of the county of Northumberland, under 20 & 21 Vict. c. 43.

On the 21st of July, 1874, the appellants made a complaint against the respondents for negligently and wilfully, and without reasonable cause, omitting and refusing to enter the names of the appellants in the occupier's column of the rate-book of the township of Seghill, contrary to the provisions of the Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 19. (1)

(1) 32 & 33 Vict. c. 41, s. 19: "The overseers, in making out the poor-rate, shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the

At the hearing it was proved that John Smith, the appellant, resided in a house at Seghill belonging to his employers, the owners of Seghill Colliery, for which he paid no rent; that he received no notice to quit, nor did he claim to be entitled to such notice; that the occupancy of his house ceased at the moment when his service ceased; and that the notice to quit his work was a notice to quit his house; that the owners of the colliery have about 340 houses at Seghill, and they fill these up with workmen in their (the owners') discretion, giving preference to married men: this the men regulate themselves; but a workman cannot go into a house without the owners' concurrence; that it sometimes happens there are more workmen than houses. Some of the workmen are single men, and no house is given to them, but they get the same tonnage price, that is, wages, as all other workmen, but no allowance for rent, the owners giving preference to a married man, or one who is associated with a family, in the distribution of houses.

If a house was vacant the owners could call upon a workman to go into it. If there are not sufficient houses close to the colliery belonging to the owners, and to accommodate all their workmen, they made an allowance to the married men and men associated with families, to assist the married workman in paying his rent, but this allowance was made only when the workman actually occupied a rented house, and not if he was in lodgings. In the cases in which an allowance was made to men residing at a distance, it was not the exact sum paid by the man for rent (into which the owners did not inquire), but a certain sum was paid to men having rented houses, but as soon as a colliery house was vacant the owners could call upon a workman to go into it, and if he did not go his allowance would cease; that it was not absolutely necessary for a workman to live in a house belonging to the

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occupier of any rateable hereditament from the rate, or negligently or wilfully mis-states any name therein, such overseer shall for every such omission or mis-statement be liable on summary conviction to a penalty not exceeding two pounds: provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted."

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owners to perform his work. The owners prefer the workman to live near their work. In the class of cases of rented houses workmen would appear on the rate-book as actual occupiers.

The owners of the colliery do not compound for their rates under the Poor-rate Assessment and Collection Act, 1869, or any other Act, but pay upon the full rate and claim to appear both as owners and occupiers.

It was admitted that the appellants were not entered in the occupier's column of the rate-book, and that they had duly demanded to be so entered, and to be separately rated. But the owners of the colliery were entered as the occupiers of the houses.

It was contended on behalf of the appellants that s. 19 of the Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), required the overseers to enter on the rate-book their names as occupiers, and by the respondents that the occupation was as a servant, and incidental and subsidiary to the service.

The justices were of opinion that the appellants were not occupiers, and they therefore dismissed the case.

The questions for the Court were, first, whether the appellants were occupiers within the meaning of the Poor-rate Assessment and Collection Act, 1869, and whether they were entitled to be entered in the occupier's column of the rate-book for the township of Seghill; secondly, whether the occupation was that of a servant and incidental and subsidiary to the service.

Herschell, Q.C. (*Jemmett* with him), for the appellants. There are two questions. First, whether the appellants occupy as servants or as tenants. Secondly, whether the case comes within s. 19 of 32 & 33 Vict. c. 41. First, the appellants occupy as tenants, and not as servants. The distinction is whether the person is required to live in the house for the performance of services, or whether he is permitted to occupy a house as part of the remuneration for services to be performed. In the first case he occupies as servant; in the other as tenant: *Hughes* v. *Overseers of Chatham.* (1) The payment of rent is not necessary to create a tenancy; an occupation as tenant at will is sufficient.

(1) 5 M. & G. 54.

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The facts of this case closely resemble those in *Parker's Case.* (1) There the quarter-master of Marines had an allowance for rent and rates under the name of "lodging money;" he was not compelled to live in the house, but was at full liberty to reside elsewhere if he chose; but in such case, unless he did so at the request of the Admiralty, he would have no allowance made to him for lodging money. The Court held that the occupation was as tenant. That decision appears to be conclusive. *Dobson* v. *Jones* (2) is the leading authority for the proposition that where the occupation is required, and is connected with the more efficient performance of services, it is that of a servant. In that case the surgeon was required to occupy the residence within Greenwich Hospital for the more efficient performance of his duties as surgeon. *Dobson* v. *Jones* (2) was followed in *Fox* v. *Dalby* (3), and in this last case Lord Coleridge, C.J., says: "It appears that the voter here is ordered by his commanding officer to reside in the house in question in order to perform the duties which are imposed on him, and it is manifest that it is a convenient thing that he should reside near to the stores which he has to look after." The case finds that it was optional with the married workmen to occupy the houses, and that it was not absolutely necessary for them to live in the houses to perform their work, they therefore occupied the houses as tenants, and not as servants. As to the second point, the words of s. 19 are very wide. By the very words of the enactment that section applies to every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier. It is difficult to see to what case the section does not apply; it seems to include all cases, for in every case the rate is collected either from the owner or the occupier. It will be contended on the other side, on the authority of *Cross* v. *Alsop* (4), that s. 19 only applies to cases where there has been an agreement in writing under s. 3 between the overseers and the owners of the premises to receive the rates from him, or where there has been an order of the vestry for rating the owner instead of the occupier under s. 4. But in that case it was not necessary to decide the

(1) 5 M. & G. 73, 80.
(2) 5 M. & G. 112.
(3) Law Rep. 10 C. P. 285, 294.
(4) Law Rep. 6 C. P. 315.

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present point. There the question was whether an occupier of part of a house ought not to be separately rated. The voter's name had not been omitted from the rate-book, for the three occupiers had been rated jointly for the full rateable value of the house. The case, therefore, could not fall within the proviso at the end of s. 19, and the dicta of the learned judges were not necessary to the decision.

Littler, Q.C. (*J. W. Mellor* with him), for the respondents. As to the first point. The occupation of the houses by the appellants is required for the better performance of their duties at the colliery; they therefore occupy as servants, and not as tenants. The case is within the decision of *Dobson* v. *Jones*. (1) If the appellants did not work at the colliery they would not be allowed to reside in the houses; the case is like that of a coachman occupying rooms over a stable. Lord Coleridge, C.J., in his judgment in *Fox* v. *Dalby* (2) says, "As is well pointed out by Cresswell and Crowder, JJ., in *Clark* v. *Overseers of Bury St. Edmunds* (3), if either ingredient exists, if the occupation be necessary for the better performance of the duties required to be performed by the party, or if, though it be not necessary for their performance, he is required by the authority by which he is appointed to reside there in order to perform them, the occupation is not an occupation as tenant." In the present case the occupation is necessary for the better performance of the appellants' duties. A workman can better perform his duties as a collier if he reside near to the colliery than if he reside at a distance. The cases relating to the law of settlement afford a strong analogy and are in point. In *Rex* v. *Cheshunt* (4) the pauper was in the employment of the Board of Ordnance; he occupied a house which was afterwards bought by the board, and he continued to reside in it at a weekly rent of 2*s.*; he inhabited the house only so long as he continued in the employment of the board. From these facts the Court drew the inference that the pauper was entitled to hold the house during and for the more convenient performance of his service, and they held that the

(1) 5 M. & G. 112.
(2) Law Rep. 10 C. P. at p. 294.
(3) 1 C. B. (N.S.) 23, 31; 26 L. J. (C.P.) 12.
(4) 1 B. & A. 473, 476, 477.

occupation was not that of a tenant. Lord Ellenborough points out the great inconvenience that would result from holding that the relation of landlord and tenant subsisted, for in that case it would become necessary to turn such persons out of possession by the regular proceedings in ejectment, and every gentleman having twenty or thirty cottages in which his labourers resided would be compelled on any change of their service to have recourse to such means. Bayley, J., says, "The case of *Rex* v. *Minster* (1) decided that the occupation of a tenement which was wholly unconnected with the service would confer a settlement, but that the occupation of one connected with the service would not. In this case the tenement is connected with the pauper's service under the board." So, in the present case it is convenient for the master to have his workman living in the house near his work, and convenient for the workman to dwell there the better to perform his work. The occupation, therefore, is that of a servant: *Bertie* v. *Beaumont* (2); *Rex* v. *Kelstern* (3); *Reg.* v. *Spurrell.* (4) With regard to the second question *Cross* v. *Alsop* (5) is in point. Section 19 is limited to the two cases mentioned in ss. 3 and 4. Willes, J., says, "It is quite obvious to my mind that the case is not within the proviso in s. 19, which is only a machinery to prevent the occupier from being damaged by the omission of his name from the rate-book, where the rate is collected from the owner under an agreement entered into under s. 3, or where there has been an order of the vestry under s. 4." Section 19, therefore, does not apply to the present case, for the case finds that the owners of the colliery do not compound for their rates, but pay upon the full rate and claim to appear both as owners and occupiers. Moreover, s. 19 is both by the preamble and by s. 1 restricted to the occupation of tenements held for short terms.

Herschell, Q.C., in reply.

MELLOR, J. We are all of opinion that the justices have decided wrongly, and that the appellants are persons entitled to have their names entered upon the rate-book. The question whether an

(1) 3 M. & S. 276.
(2) 16 East, 33.
(3) 5 M. & S. 136.
(4) Law Rep. 1 Q. B. 72.
(5) Law Rep. 6 C. P. 315, 324.

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occupier occupies as tenant or as servant has been discussed in cases which relate to the law of settlement, and also in cases relating to the franchise; but I think it is unnecessary to consider the cases decided before *Hughes* v. *Overseers of Chatham* (1) and *Dobson* v. *Jones.* (2) Those cases establish the principles by which we must be governed. Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant. In *Dobson* v. *Jones* (2) the decision was based upon the ground that the surgeon was required to reside in the house for the purpose of thereby enabling him the more readily to perform the services required of him, and it was therefore held that the surgeon occupied not as a tenant but as a servant. On the other hand, in *Hughes* v. *Overseers of Chatham* (1), the ropemaker was permitted to reside in the house in part remuneration of his services, and, not residing there for the purpose of performing his duties, he was held to occupy as tenant. It is quite true that the present appellants, in one sense, were required to reside in the houses of their employers, because the owners of the houses, engaging the appellants in their employment and paying them by piecework, desired them to reside in the houses while engaged in their service, and in that sense they were required to reside in the houses while engaged in their employers' service; but that is not the meaning of the words as used in *Hughes* v. *Overseers of Chatham.* (1) "Required" means more than the master saying, "You must reside in one of my houses, if you come into my service." The residence must be ancillary and necessary to the performance of the servant's duties; and unless he is required for that purpose to reside in the house, and not merely as an arbitrary regulation on the part of the master, I do not think he is prevented from occupying as a tenant. Then it appears that the appellants and other workmen are only entitled to occupy the houses during the time of their service at the colliery; the occupation terminates at the time the service terminates. Still, the appellants are tenants, though not tenants

(1) 5 M. & G. 54, 78. (2) 5 M. & G. 112.

for any fixed time. They occupy as tenants at will as long as they reside in the houses by the arrangement between themselves and their masters. Then it appears that if there was no house for a married workman, he had an allowance for house rent, but if there was a house empty, and the workmen would not come into it, he had no allowance. An inference might possibly be drawn from this, that, as he was bound to reside if a house was offered him, upon pain of forfeiting his allowance, he resided in it upon compulsion, and therefore his occupation was that of a servant; but I cannot assent to this, and, in my opinion, those workmen who did reside in the houses resided in the character of tenants. The colliery owners desire that the married workmen should reside near the works, but that does not change the relation between the parties; unless the men are required to live in the houses for the better performance of their duties, it does not convert the occupation of a tenant into that of a servant. The governing principle is that, in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform. Here the occupation is not connected with the performance of the employment, and the appellants, therefore, occupy as tenants.

With regard to the other question, I confess I had great difficulty in seeing that the Court of Common Pleas have not decided this point in *Cross* v. *Alsop*. (1) I think, however, upon the whole, the opinion which the Court expressed on the construction of s. 19 was not necessary to the decision of that case. It was sufficient to have decided *Cross* v. *Alsop* (1) that the occupier of part of a house must be separately rated to the relief of the poor, to entitle him to the franchise under the 3rd and 61st sections of 30 & 31 Vict. c. 102, and that a joint rating with other occupiers was not sufficient. Therefore, without interfering with *Cross* v. *Alsop* (1), the construction put upon s. 19 being not directly necessary for the decision of that case, we are at liberty to consider the construction of that section independently of that authority. I think, the words used in s. 19 being general and large, and the object being an enfranchising object, we ought to construe them, so far as we can, in a liberal spirit. Now, s. 19

(1) Law Rep. 6 C. P. 315.

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says, "the overseers shall in every case." In *Cross* v. *Alsop* (1) the Court of Common Pleas were of opinion that the section was confined to two cases, those mentioned in ss. 3 and 4. That, no doubt, was a narrow construction. I think we ought to construe this section so as not to limit the franchise, but as compelling the overseers to put every occupier on the rate-book. I own I feel great difficulty as to the true construction of s. 19, but upon the whole I have come to the conclusion that the justices ought to have decided that the appellants were entitled to have their names entered in the rate-book.

LUSH, J. The first question is, in what character the colliers held the houses that were allotted to them by the colliery owners. [The learned judge read the facts.] Their position therefore, was, that there were a number of houses belonging to the colliery owners, who called upon those men who had families to occupy any houses that became vacant, and considered the occupation of the house as an allowance made in part-payment of their wages; and if the colliery owners had no house for the workmen to occupy, then they made them an allowance towards the payment of the rent, but the occupation had nothing whatever to do with the service further than as being convenient to both parties; and the men were not required by the colliery owners to occupy the houses, for the only consequence of their not occupying the houses was, that they forfeited the allowance for house rent; and this usage did not apply to single men at all; they had no such allowance. These facts bring the present case within the authorities, of which *Hughes* v. *Overseers of Chatham* (2) is a well-known instance. There Tindal, C.J., distinguished between the different cases, and after referring to the cases which had been decided on the point, he says: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring upon him an interest in real property, either in fee for years, at will, or for any other estate or interest, and if he does so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a

(1) Law Rep. 6 C. P. 315. (2) 5 M. & G. 54, 78.

servant may occupy the tenement of his master, not by way of payment for his services, but for the purpose of performing them. It may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases cited in argument established and proceeded on this distinction." Now that is exactly the distinction to be applied here. The colliers were not required to occupy the houses; the occupation was not in any way connected with the service, either as being indispensable to the performance of their duty, nor was it required by the owners that they should occupy as a part of their terms of service. Therefore, I think it comes within the class of cases in which it has been decided that the occupation is not in the character of servant. It is true that the holding is not for any fixed term; the tenure is co-existent with the service; but it may still be that during the period of the service the colliers occupy in the character of tenants. There is the more recent case of *Fox* v. *Dalby* (1), where the same principle is applied. The Court decided there that the respondent occupied in the character of a servant, because he was required by the commanding officer to live in the house; and Lord Coleridge, C.J., says, after reading the judgment of Tindal, C.J., in *Dobson* v. *Jones* (2): "The voter here is ordered by his commanding officer to reside in the house in question in order to perform the duties which are imposed upon him; and it is manifest that it is a convenient thing that he should reside near to the stores which he has to look after. Whether, therefore, upon principle, or upon the authority of the three cases I have referred to"—that is, the *Chatham Case* (3), *Dobson* v. *Jones* (2), and *Clark* v. *Overseers of Bury St. Edmunds* (4)—"all of which are binding authorities on us, and all more or less in point, I am of opinion that the occupation in this case has no one of the incidents of an occupation either as owner or as tenant." That, I think, exactly accords with the decision in the *Chatham Case.* (3) There the parties were permitted to live in the house. The occupation was neither necessary for the due performance of the service nor required by the owner. And

(1) Law Rep. 10 C. P. 285.
(2) 5 M. & G. 112.
(3) 5 M. & G. 54.
(4) 1 C. B. (N.S.) 23; 26 L. J. (C.P.) 12. 3 Jur. N.S. 645.

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I think our decision in this case in no way conflicts with *Fox* v. *Dalby*. (1)

The remaining question is, whether the overseers are liable under s. 19 of 32 & 33 Vict. c. 41, for "negligently or wilfully, and without reasonable cause, omitting the name of the occupier of any rateable hereditament from the rate." But the only point with regard to s. 19 argued before us was, whether the appellants were entitled to be put on the rate-book. It has been contended that s. 19 is confined to the two cases mentioned in ss. 3 and 4, and that it does not extend to the present case. I own I am not able to follow the reasoning of some of my learned Brothers in *Cross* v. *Alsop* (2); and I cannot help observing that the construction of s. 19 was not involved in the case before them. There, a person, who occupied a part of a house, and who was entitled to be rated for that separate part, was, in fact, rated by the overseers jointly with the occupiers of the rest of the house as tenants of the whole house; and the question there was, whether that could be cured by anything found in s. 19, and that turned on whether the proviso would entitle the claimant to stand in the same position as if his name was separately entered in the rate-book, the proviso being, "that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been so omitted." In *Cross* v. *Alsop* (2), therefore, the name of the occupier had not been omitted from the rate-book; his name was there, but he was put there as the joint occupier of the whole house and not as occupier of a part, and it was only by being separately rated for the particular portion he occupied, that he would be entitled to the vote. It is true that there are some strong observations by some of the judges as to their view of the whole scope of s. 19. Still it was not necessary to the decision of the case to construe that section. I think we are not only at liberty, but are bound to form our own opinion, because here it is necessary to put a construction on that section; it is upon that section the overseers are sought to be made liable for the omission, and that compels us to see what is its true meaning.

Now the 3rd and 4th sections apply only to cases in which the

(1) Law Rep. 10 C. P. 285. (2) Law Rep. 6 C. P. 315.

owner of the property has become rateable for the property instead of the occupier; s. 3 applies to cases in which the owner makes an agreement with the overseers to become liable for the poor-rates, and s. 4 to cases in which the vestry have made an order that the owner shall be liable to the poor-rates instead of the occupier. But there are other sections of the Act that go beyond that. There is s. 7, which says that every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided,—referring to s. 1,—and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, shall be a good payment. There is nothing in s. 1 that speaks about the agreement between the landlord and tenant as to the payment of the rate; and there is nothing in s. 7 that confines the operation of the section to cases where the premises are let for a term not exceeding three months. That clearly goes beyond ss. 3 and 4. Then s. 19 says, "The overseers, in making out the poor-rate, shall in every case, &c." Construing it, therefore, according to the words, it applies to every case; in every rate that is made the occupiers shall be rated, and in order to make it embrace every case whatever, these words are added, "whether the rate is collected from the owner or occupier, or whether the owner is liable to the payment of the rate instead of the occupier." This last portion alludes to ss. 3 and 4, so that so far from the section being limited, it applies to every case and every rate, and it says the overseers shall, in making out the poor-rate, in every case enter the name of the occupier, and if they negligently omit it, they shall be liable to a penalty. There is the same reason for requiring the mention of the occupier's name in cases where there is no question that the owner is liable to the rates, and I think, therefore, the statute is intended to apply to all cases, and to secure that the person shall not be in any jeopardy about his franchise by any act of negligence on the part of the overseers, it enacts that they shall, under a penalty, be obliged to put in every rate the name of the occupier of the premises.

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QUAIN, J. I am of the same opinion. I think the appellants

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are the occupiers within the meaning of s. 19, and their names should have been entered in the rate-book. It was contended that the appellants were not tenants, but servants, and as servants they were not occupiers within s. 19. Now the governing facts of the case were these. The men were paid not day wages, but by piece work, according to the quantity of coal hewn in a certain number of hours; therefore the occupation of the houses had nothing to do with their wages, nor was it in any way taken into consideration in determining the amount of wages they earned. But these houses were offered as an inducement to the married men to live near the works; and an important fact is, that the men were not required to keep these houses as a condition of their service; they were permitted to occupy them as married men, but it was no necessary part of the service that they should live in the houses. That appears to me to be a material circumstance, and plainly distinguishes the case from that of the occupation by a gardener or a coachman, or the surgeon's residence in Greenwich Hospital: *Hughes* v. *Overseers of Chatham.* (1) It seems to me, therefore, the facts of this case bring it within the distinction pointed out by Tindal, C.J., in *Dobson* v. *Jones.* (2) Having the *Chatham Case* (1) before him, he says: "We drew the distinction between those cases where officers or servants in the employment of Government are permitted to occupy a house belonging to the Government as part remuneration for the services to be performed, and those in which the places of residence are selected by the Government, and the officers or servants are required to occupy them with a view to the more efficient performance of the duties or services imposed upon them." Here it is clearly not a case where the colliers were required to occupy the house, nor was the occupation essential or necessary, nor did it enable them to perform their duties more efficiently. It was merely thought convenient, as far as the married men were concerned, that they should live near the works. Tindal, C.J. (2), afterwards proceeds to say, "Upon that occasion we declared our opinion to be that those officers or servants who fell within the first description, might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and

(1) 5 M. & G. 54. (2) 5 M. & G. at p. 120.

although they might, if such residence had not been allowed to them, have had an additional allowance for lodging money; whilst at the same time we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer and to the more effectual performance of the service required from such officer and servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into the house in the garden, or the porter who occupies the lodge at the park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters." It appears to me that this case is brought within the first class of persons pointed out by Tindal, C.J., and, the appellants not being required to occupy these houses, but merely permitted to occupy them, as an inducement to live near the works, the occupation is not like the occupation of a gardener in a gardener's house, nor the coachman near the stable. Therefore the case is within the *Chatham Case* (1), and is not within the case of *Dobson* v. *Jones* (2), and the distinction pointed out in *Dobson* v. *Jones* (2), which I have just read, really governs this case, and makes the appellants occupy as tenants and not as servants.

The second question is whether s. 19 applies. I wish to be understood as giving no opinion whether the overseers were guilty of negligently or wilfully and without reasonable cause omitting the name. *Cross* v. *Alsop* (3) is cited as an authority for the respondents, and it is argued that there being in this case no agreement for the owner to pay the rate under s. 3, and no order by the vestry under s. 4, s. 19 has no bearing on the present case. There are, no doubt, opinions given by the learned judges in *Cross* v. *Alsop* (3) that must be understood as supporting the respondents' contention, but I cannot say that those opinions were essential or necessary for the decision of *Cross* v. *Alsop*. (3) There the Court had to decide whether it was necessary that the occu-

(1) 5 M. & G. 54. (2) 5 M. & G. 112, 120.
(3) Law Rep. 6 C. P. 315.

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pier of part of a house should be separately rated. That was the first point in the case; and it was admitted he was not separately rated. Then it was attempted to save his franchise under the proviso of s. 19, by saying, that he was a person who ought to have been upon the rate, but his name was omitted by the negligence of the overseers. The answer the Court gave to that was, that his name was not omitted. It was not entered separately in the rate-book, but it was inserted as a joint occupier with two others, and therefore the case was not within the proviso. That seems to me to be an exceptional ground; and not adopting some of the other dicta in the case upon the early part of s. 19, I confess I am unable to read s. 19 as solely confined to cases where there has been an agreement under s. 3 for the owner to pay the rate, or an order under s. 4. It appears to me it also applies to the simple case of an occupier where there is no agreement by the owner to pay the rate, or no order of the vestry that he shall be rated. As I read the section, it is this, that all overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or whether the owner is liable to the payment of the rate instead of the occupier, enter the name of the occupier in the rate-book, and such occupier shall be deemed to be duly rated for any qualification or franchise; therefore it refers to every case, including the present case. I cannot follow the Court of Common Pleas in saying that s. 19 is confined only to the cases mentioned in ss. 3 and 4. For these reasons I think the appellants are entitled to the judgment of the Court.

Case remitted to the justices.

Attorney for appellants: *John Scott.*

Attorney for respondents: *John Tucker, for W. S. Daglish, Newcastle-upon-Tyne.*

HALL *v.* THE NORTH EASTERN RAILWAY COMPANY.

1875
June 18.

Railway Company—Non-liability of Company where a Person travels "at his own Risk" over their Line under a Contract with another Company.

Plaintiff was a person in charge of sheep, which were sent from Angerton in Scotland to Newcastle, under a note or ticket, issued by the North British Railway Company, which contained the following: "78 sheep from Angerton to Newcastle, N.E. If it is desired that any drover or person accompanying the live stock shall be allowed to travel in the same train as the live stock without paying a fare, he must travel at his own risk, and must either sign this, in token that he agrees to travel at his own risk, or he must pay fare as a passenger: I agree to travel at my own risk without paying any fare, and accept a free pass subject to the following conditions: . . . . That the holder is subject to the bye-laws of the company, and he exonerates the company from all responsibility for injury or loss to himself, howsoever occasioned, on the journey for which it is issued or used." There was a place for the signature of the drover at the bottom; the plaintiff did not sign it; but he travelled by the same train as the sheep without paying any fare. The North British Railway goes no farther than Morpeth, and the sheep and plaintiff were carried on in the same trucks and carriage, attached to a train of defendants, the North Eastern Railway Company, on defendants' line to Newcastle, under arrangements between the two companies. After the train left Morpeth, it was run into by another train of defendants owing to the negligence of defendants' servants in charge of that other train, and plaintiff was injured:—

Held, that the ticket under which plaintiff travelled meant that he should be at his own risk during the whole of the journey; and it extended to protect defendants just in the same way as it protected the North British Company from all liability for the consequences of any risk connected with the train or line of railway.

FIRST COUNT, that plaintiff was received as a passenger by defendants, to be carried by their company from Morpeth to Newcastle for reward to defendants. Yet defendants so negligently conducted themselves in relation to carrying plaintiff, that an engine and train came into collision with the train in which plaintiff was, and he was injured.

Second count, that defendants were carriers of certain cattle in certain trucks upon their railway from Morpeth to Newcastle for reward, and plaintiff was received by defendants to be carried in a carriage attached to the trucks, as the person in charge of the cattle, and in consideration that plaintiff would, at request of defendants, look after the cattle on the journey defendants promised

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to carry plaintiff safely and securely on the said journey. Yet defendants, as in first count.

Third count, that plaintiff was lawfully in a certain carriage upon the North Eastern Railway and defendants were possessed of certain carriages, which, together with the carriage in which plaintiff was, were being driven under the care and guidance of defendants; that defendants conducted themselves negligently in the guidance of the carriages, and plaintiff was injured while so lawfully on the railway.

Pleas: 1. To first and second counts, that plaintiff was not received by defendants to be carried on the terms alleged.

2. Not guilty.

3. To second count, that defendants did not promise as alleged.

4. To second count, that plaintiff was received on the terms that he should be carried at his own risk, without payment by him.

5. To last count that plaintiff was lawfully on the railway on the terms mentioned in the fourth plea.

6. To the last count, that plaintiff was not lawfully on the railway as alleged.

Issue joined.

At the trial before Pollock, B., at the Northumberland spring assizes, 1875, it appeared that the plaintiff was the person in charge of seventy-eight sheep which were sent from Angerton in Scotland to Newcastle. The material parts of the ticket, which was issued to the plaintiff by the North British Railway Company, and under which the cattle were sent were as follows:—

"North British Railway Company.

"Live Stock Ticket.

"78 sheep. From Station, Angerton, to Station, Newcastle, N.E.

"Terms of special contract. . . . .

"If it is desired that any drover, or person accompanying the live stock shall be allowed to travel in the same train as the live stock without paying a fare, he must travel at his own risk, and must either sign this in token that he agrees to travel at his own risk, or he must pay fare as a passenger.

"I agree to travel at my own risk without paying any fare, and accept a free pass subject to the following conditions, viz.:—

"This pass is issued free by the company, and subject to the

following conditions on which it is accepted by the holder, viz.: That it is available only for the train by which the live stock is being conveyed, and if by a passenger train for third class only. That the holder is subject to the bye-laws of the company, and he exonerates the company from all responsibility for injury or loss to himself howsoever occasioned on the journey for which it is issued or used.

"Witness ——. Signed ——, Drover."

On the back of the ticket was: "Drovers in charge of live stock are allowed to travel in the same train with the stock without paying fare, but solely at their own risk."

The plaintiff did not sign the ticket, and was not asked to do so; but he travelled by the same train with the sheep without having paid any fare. The North British line goes no further than Morpeth; but from Morpeth the cattle-trucks and the carriage in which the plaintiff was were attached to a train of the defendants and sent on to Newcastle along the North Eastern line, the defendants' railway, by traffic arrangements between the defendants and the North British Company. (1)

After leaving Morpeth the train in which the plaintiff travelled was run into by another train owing to the negligence of the defendants' servants in charge of the other train, and the plaintiff received injuries from the collision.

The jury returned a verdict for the plaintiff for 100*l.*, leave being reserved to move to enter the verdict for the defendants.

A rule was obtained accordingly, on the grounds: first, that there was no evidence of liability; secondly, that the ticket was conditional on the plaintiff travelling at his own risk to Newcastle, or that he was travelling on the North Eastern Railway at his own risk and without a ticket.

Herschell, Q.C. (with him *J. Bruce*) shewed cause. The terms of the ticket do not protect the defendants. The plaintiff was lawfully on the defendants' railway by reason of his contract with the North British Company, to which the defendants were no party, beyond allowing him to be carried on to Newcastle; and

(1) The arrangements were not proved at the trial, but it was assumed on the argument that such arrangements existed.

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the defendants negligently drove another train against the train in which the plaintiff was riding, and injured him; the defendants are therefore liable.

[QUAIN, J., referred to *Coxon* v. *Great Western Ry. Co.* (1)]

There the plaintiff was obliged to rely on the contract, which, no doubt, in the present case was with the North British Company; and the terms of the ticket are expressly confined to "the company."

[BLACKBURN, J. The plaintiff exonerates the company from all responsibility for injury, howsoever occasioned, on the journey for which the pass is issued; that is not wider than the terms in *Carr* v. *Lancashire & Yorkshire Ry. Co.* (2)

QUAIN, J. *Great Western Ry. Co.* v. *Blake* (3) shews that a company would be liable, under their contract of carriage, for not keeping the line clear.]

J. Kay, Q.C., and *Crompton*, in support of the rule. The plaintiff was lawfully travelling as a passenger on the defendants' railway only by reason of the contract he had entered into with the North British Company, by which he travelled free, and undertook all risks of the entire journey; and "he exonerates the company from all responsibility for injury, however occasioned, on the journey for which the pass is issued or used." It is clear, therefore, that if an action could be otherwise maintained against the defendants, the terms of the ticket extend to protect them just as much as the North British Company. And it is scarcely denied that the consequences of a collision with another train of the same company, by reason of the negligence of the servants in charge of that other train, are risks from which the North British Company would have been protected.

BLACKBURN, J. I am of opinion that the rule should be made absolute. The facts are beyond dispute. The plaintiff went with live stock from Angerton on the North British Railway, and travelled in the same train with them to Newcastle. At Angerton he received a ticket with the following conditions. [The learned judge read the material parts on the face and back of the ticket.] By taking this ticket he made a contract for the

(1) 5 H. & N. 274; 29 L. J. (Ex.) 165. (2) 7 Ex. 707; 21 L. J. (Ex.) 261.
(3) 7 H. & N. 987; 31 L. J. (Ex.) 346.

whole journey with the North British Company: *Bristol and Exeter Ry. Co.* v. *Collins.* (1) It is true the plaintiff did not sign the ticket, and he was not asked to do so; but he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it. The ticket purports to be from Angerton to Newcastle, and it is expressed that Newcastle is N. E., that is, on the North Eastern Railway. The two questions are: first, how far the terms of this ticket protect the North British Company; and, secondly, whether it enures to protect the North Eastern Company. As to the first question, I think the terms of the ticket did protect the North British Company from the consequences of a collision with another train of that company; that, I think, was one of the risks which the plaintiff took upon himself. It is very much like the contract as between master and servant, in which the servant undertakes all the ordinary risks of the service, including risk of being injured by the negligence of other servants in the same employ. On the second question, the defendants, the North Eastern Company, received the plaintiff as sub-contractors, and so took him on to Newcastle. There was no negligence connected with the train in which the plaintiff was, but the collision took place owing to the negligence of the defendants' servants managing the other train; and if the contract had been with the North Eastern Company they would have been clearly protected. Now there can be no doubt that the North British Company handed over the plaintiff as a passenger to be carried on by the North Eastern Company to Newcastle. They had not running powers over the line, but they handed him over to the North Eastern Company under what are called traffic arrangements. When the plaintiff went to the North British Company and took a ticket, under which he was to be carried from Angerton to Newcastle, he, in effect, agreed that the North British Company should secure that the North Eastern Company should carry him on from Morpeth to Newcastle; and when he engaged to travel at his own risk, he engaged with the North British Company that they should agree with the North Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended

(1) 7 H. L. C. 194; 29 L. J. (Ex.) 41.

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to Newcastle. It is clear that this is the true construction of the ticket: "In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk;" and it seems to me that the plaintiff did authorize the North British Company to contract for him with the North Eastern Company, and what he authorized was that he should travel at his own risk. Mr. Herschell put his argument on a rather special ground, that "the company" is the term used throughout, and that this must be confined to the North British Company, and that it amounts to saying, "As far as the North British Company is concerned, I am travelling at my own risk;" I cannot think that any such argument can be sustained from the terms used, which are on a general form applicable to all journeys. In fact, in most cases where a passenger takes a ticket from one place to another, he does not know where one line ends and another line begins. I think it must be taken that the plaintiff intended the terms on which he travelled to be communicated to the North Eastern Company, and that he must be taken to have assented that the ticket should protect the North Eastern Company just as much as the North British, and that the terms of this ticket extended to all risks connected with the journey which the plaintiff might meet with as a passenger.

LUSH, J. I am of the same opinion. The question is, what is the proper construction to be put upon the terms of this ticket; and there is no technical difficulty in construing them. The terms of the ticket purport to extend throughout the whole journey for which it is used, that is, from Angerton, on the North British line, to Newcastle, on the North Eastern line. On this journey the plaintiff takes upon himself all risks to the extent of exonerating the company along the whole journey. The risk which the plaintiff encountered was a risk for the consequences of which the North British Company would have been liable as carriers of passengers, viz. the mismanagement of another train by their servants on their own line. Was there any difference that it occurred on the North Eastern line? I can see none. I do not think we are running counter to any case or principle of law. I think the plaintiff was bound by the terms of the ticket just as

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much on the North Eastern line as on the North British. The North Eastern Company carry on the live stock and passengers, the traffic of the North British, from the North, by arrangements with them; and the profits in the way of fares are divided between the two companies. And it must be taken that the North British Company have authority from the North Eastern to make one contract for the whole journey. The plaintiff claimed to travel on the North Eastern line without paying any fare, and therefore on the same terms on which he travelled free on the North British line; for the terms are that he will bear the risk of the misconduct of those in charge of the train in which he travels, or of any other, the liability for whose negligence would be on the company if the plaintiff had been a passenger paying a fare. I confess I cannot see any difficulty in so holding.

QUAIN, J. I have come to the same conclusion, though, I confess, with more doubt than my learned Brothers. The precise question has not arisen before; it is, On what terms was the plaintiff travelling on the North Eastern line? It is admitted that there is but one contract. At the time of making the contract, the plaintiff knew quite as well as the company the relative position of the two lines. He makes one contract on the terms that he shall travel the whole journey from Angerton to Newcastle at his own risk. It is conceded that as far as the journey on the North British line that company was protected. It would certainly be very strange if, where there is but one contract to carry a passenger on a journey on two lines, the part on the North British line is to be on different terms to that on the North Eastern; and there can be little doubt that the contract between the two companies is on the basis that there shall be one contract to protect both companies. The only reasonable view is that the ticket affords the same protection to the North Eastern Company as to the North British Company.

Rule absolute.

Attorneys for plaintiff: *J. Crowdy & Son, for Griffith & Atkinson, Newcastle.*

Attorneys for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

1875
June 26.

[IN THE EXCHEQUER CHAMBER.]

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* BUCKMASTER AND OTHERS.

Poor-rate—Construction of Agreement—Exclusive Occupation—Licence or Demise.

The plaintiffs, a railway company, were the owners of some stables situate within the fence of the station, to which access was obtained through two gateways from the public roads. By the permission of the plaintiffs, the stables were used by coal-owners, under agreements by which the coal-owners, "in consideration of the railway company permitting us to occupy and use a stable for four horses, do hereby agree to pay the monthly rent or sum of 1*l.* 5*s.*, without any deduction whatsoever (property tax only excepted); and we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the railway company for the government and use of their railway stations, premises, and conveniences; and we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose, signed by any agent of the company, to be given at any time, shall be served on us, our executors or administrators, either personally or by being affixed to any part of the stable, provided that in such case a proportionate part only of the rent for the current month shall be paid." The plaintiffs had not in fact exercised any control over or used any of the stables during the currency of the agreements; and none of the bye-laws had any application to the stables. The plaintiffs having been rated to the poor-rate in respect of the stables:—

Held (by Lord Coleridge, C.J., and Pollock and Amphlett, BB.), affirming the judgment of the Queen's Bench, that the plaintiffs were rightly rated as occupiers: for that, on the true construction of the agreement, looking at the situation of the stables, it was the intention of the plaintiffs to retain control over the stables, and not to part with the exclusive occupation to the coal-owners; (Cleasby, B., and Grove and Denman, JJ., being of a contrary opinion).

ERROR from the judgment of the Queen's Bench in favour of the defendants on a special case; ante, p. 70; where the facts are fully stated.

June 14. *Littler, Q.C.* (with him *R. E. Webster*), for the plaintiffs.

June 15. *Herschell, Q.C.* (with him *H. Glen*), for the defendants.

The following cases were referred to: *Reg.* v. *Abney Park*

Cemetery Co. (1), *Reg.* v. *St. Mary Abbot's* (2), *Cory* v. *Bristow.* (3)

Cur. adv. vult.

June 26. The judgment of Lord Coleridge, C.J., and Pollock and Amphlett, BB., was delivered by

AMPHLETT, B. This is an appeal from a decision of the Court of Queen's Bench, that the plaintiffs were properly rated as occupiers in law in respect of certain lines of railway and a stable, all within the ambit or curtilage of their station at Clapham Junction; and that consequently a distress for the rates was good.

This Court was unanimously of opinion, on hearing the appellant's counsel only, that, so far as related to the lines of railway, the plaintiffs were liable to be rated; and accordingly the only point left for decision is as to the stable, which was, in fact, in possession of the Clay Cross Company, under the agreement dated the 5th of February, 1870, set out in the case.

If the effect of that agreement was to create an actual demise of the stable in favour of the Clay Cross Company, it was not, and, in my opinion, could not be successfully disputed, that the latter company and not the plaintiffs were the proper parties to be rated, and that consequently the decision of the Court below was wrong.

It was, however, contended on the part of the defendants that the agreement did not create any estate, but merely operated as a licence to the Clay Cross Company to occupy and use the stable as an easement; and if that is the true conclusion, I am of opinion that the Clay Cross Company had not a rateable occupation, and that the decision of the Court below was therefore correct. For it appears to be settled that a mere licensee is not liable to be rated, unless he has the sole and exclusive occupation; and, in my opinion, the clause of the agreement, whereby the Clay Cross Company were to be bound by the bye-laws, &c., from time to time made by the plaintiffs, is sufficient, when taken in connection with the other circumstances in the case, to shew that the plaintiffs were to retain a control over the stables as part of their station. It

(1) Law Rep. 8 Q. B. 515. (2) 12 Ad. & E. 824.
(3) Law Rep. 10 C. P. 504.

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is true that the company have not in point of fact exercised any control over the stable during the currency of the agreement, but that, I think, is quite immaterial. The power to exercise such control is sufficient to prevent a mere licensee from acquiring a rateable occupation. Thus, in *Rex* v. *Trent and Mersey Navigation Co.* (1), where the company, under a power from the proprietors of certain limestone quarries, entered and continued exclusively for more than twenty years to work the quarries, paying 2*d.* a ton, it was nevertheless held that, because the proprietors might if they pleased have granted (although they in fact never did) a similar privilege to other persons, the company had not exclusive occupation, so as to make them liable to be rated.

The only question, then, which remains is whether the agreement did in fact operate as an actual demise; and I have come to the conclusion that it did not. For, first, it may be observed that it contains no express obligation on the plaintiffs to do anything, and it is consequently not signed by any person on their behalf, but it imposes many obligations upon the Clay Cross Company in consideration of the plaintiffs permitting them to occupy and use a stable for the accommodation of four horses. This is certainly remarkable, if it was the intention of the parties that an actual tenancy should be created, but what might be expected if there was to be a mere permissive occupation. I think, however, that if the plaintiffs had been individuals, and not a company (as to which I shall say more presently), it would be inferred that there was a contemporaneous parol agreement on the part of the plaintiffs to give effect to the consideration mentioned in the agreement, that is to say, to permit the Clay Cross Company to "occupy and use" a stable for the accommodation of four horses. But what is the meaning of these words "occupy and use"? They are no doubt not inconsistent with and might well operate to create a demise, if the rest of the agreement or the surrounding circumstances offered reasonable proof that such was the intention of the parties; but, taken by themselves, they do, in my judgment, more properly denote a mere permissive occupation or easement resembling that of a lodger. The only passage I can find in the rest of the agreement that appears to countenance a more extensive meaning to

(1) 4 B. & C. 57.

those words is that which stipulates that the rent is to be paid "without any deductions whatever, property tax only excepted," from which it is sought to be inferred, not without some plausibility, that the rates were to be paid by the Clay Cross Company. I think, however, that inference cannot be properly made in this case. I should have expected, if that was the intention, to find rates and taxes specifically mentioned; and, as to the words "without any deductions whatever," they are merely a "common form," and may have been used here to introduce the exception of the property tax, which might, I suppose, be paid by a mere lodger when a periodical rent is reserved. And it may be further observed that the property tax generally, and not merely the landlord's property tax, is excepted; whereas, if a tenancy were created, there would be a tenant's property tax as well, which could not of course have been intended to be excepted. This may be thought rather to look as if the parties were aware that there was to be no tenancy, and therefore no tenant's property tax to be paid.

The provision as to quitting and delivering up possession of the stable at the expiration of one month after notice to the Clay Cross Company, or their executors or administrators, does not appear to me to afford any inference that an actual demise was intended, inasmuch as it would be as suitable to a lodger, for instance, as to a tenant. Any licence of that kind, being accompanied by an interest, might well, as here, be extended to executors. But if there was (as contended) not a mere licence, but a demise, it would be assignable, and it is difficult to account for assigns not being mentioned in the clause respecting notice. It may be admitted, however, that inferences drawn from a minute criticism of the particular expressions of an agreement of this kind, taken by themselves, are vague and ambiguous, and I do not rest much upon them.

The broad fact remains that, considering the stable was within the curtilage or ambit of the station, and evidently intended for the accommodation of the coal-dealers who occupied offices provided for them by the plaintiffs, and carried on their business in connection with the plaintiffs' railway, it is in a great degree improbable that the plaintiffs should have intended to grant a

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demise with no provision against alienation, and no power of re-entry in case the stable should be used for other purposes than the accommodation of horses. It is possible that considerable annoyance and inconvenience might arise in this way before the plaintiffs could eject a disagreeable tenant by notice in due course of law, all danger of which is to be avoided if the agreement operated as a licence only. As, therefore, the language is at least as applicable to a licence as to a demise, I think that justice and convenience require that it should be so construed. And, further, I think there is force in the observation of my Brother Quain in his judgment in the Court below respecting the use of the indefinite article before stable in the agreement, and in the reasons which he gives, and which I will not repeat, that it was only intended to give the Clay Cross Company and the other coal-dealers accommodation for four horses in some stable on the premises at the selection of the plaintiffs, and which might be possibly part of a larger stable if convenience required it.

There was another point raised by Mr. Herschell which I think is deserving of consideration. The plaintiffs are a corporation, and cannot therefore create any estate—not even a tenancy at will,—except by an instrument under their corporate seal. How then can they be bound by a parol agreement for a demise—if, in fact, any was entered into by any person on their behalf—when the Clay Cross Company was let into possession? The plaintiffs' agent might, of course, give to that company the physical possession of the stable; but I see nothing to prevent the plaintiffs from terminating that possession at any time without giving the month's notice required by the agreement; and it may be that it was the knowledge of that circumstance which occasioned the agreement to be drawn up without any stipulation on the part of plaintiffs. In *Reg.* v. *Marquis of Salisbury* (1) it was held that the marquis was rateable for tolls of which he was the owner, and not his tenant who had actually received and paid rent for the same under a parol agreement; and the decision was based on the ground that the tolls from their nature could only pass by deed, and no interest at law therefore had passed out of the marquis. This authority seems applicable to this case, if no interest passed out of the plaintiffs,

(1) 8 Ad. & E. 716.

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for want of an instrument under their corporate seal. I do not wish, however, to rest my judgment upon this somewhat technical point, but upon the substantial merits of the case. I think that the judgment of the Court below was right, and that the appeal ought to be dismissed.

The judgment of Cleasby, B., and Grove and Denman, JJ., was delivered by

CLEASBY, B. It must be taken as admitted that if the rate was bad as to the stable, the plaintiffs in this action of replevin are entitled to recover.

As I understand that three at least of my learned Brothers are in favour of affirming the judgment, and this is not a case which, it is to be hoped, will be carried further, it might seem superfluous for me to give any reasons, and my only ground for doing so is to prevent the judgment of a Court of error from having the effect which, in my mind, it might have, of materially unsettling the law of rating. If it was a correct conclusion from the facts stated in this case, that the whole of the station within the boundaries marked was to be regarded as one tenement, and occupied as such by the railway company, in the same manner as a dwelling house, though let out in parts to various tenants, is all in the occupation of the landlord, the rate would be right. The overseers have treated it so, but, I fear, their doing so cannot be treated as evidence of the fact, since it is the matter now in dispute, and it is their interest to treat it so, because, if the whole is one occupation, the stables would be part of the subject of rating, whether used or not, like empty lodgings in a house.

I must say the materials are very slight for regarding it all as one occupation. It does not appear that there is any gate in the opening into the public street, still less that it is ever closed, much less locked. Indeed, it would seem clear from the case that there is only a gateway, and no gate, where the tenants of the stable have access, though there is a gate at the other end, near Lavender Hill. The only outer door, therefore, is that of the stable itself; and the consequence of holding it all to be one occupation would be that, if the stable was broken into and a horse stolen, the stable must be described in the indictment as the stable of the railway

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company; and, if the only outer door is that of the stable, the case of the stable can hardly be distinguished in any particular from that of the offices, and the idea of a curtilage seems to be inapplicable. The instance of an outer door, with a servant, appointed and removeable by the railway company, to take charge of it, if there was one, would be by no means conclusive, as appears by the case of *Reg.* v. *St. George's Union.* (1) It is stated at the end of this case that unless the facts stated establish an occupation by the railway company they are not occupiers. It is not to be inferred because it would seem convenient. Still, if upon the materials before them, and in the absence of any such facts as I have adverted to, my learned Brothers feel justified in concluding that the facts which do appear are such that the stables, if not used, could not be returned to the overseers as empty, but must be rated as part of the occupation of the railway company (like the case of a house with lodgers) upon this, which is, I think, only a conclusion of fact, I would rather acquiesce in their conclusion than rely upon my own view. But if the case is to be regarded as depending upon the effect of the agreement between the railway company and the gentleman who, it was said (2), formed the Clay Cross Company (and it was mainly, if not entirely, upon this the case was argued), I could only come to the conclusion that the effect of that agreement was to hand over the occupation and possession of the stable to the tenant in the same way as it does with the offices. Upon this it must be noticed that the question is, not what the title of the Clay Cross Company to the possession was, but what their possession in point of fact was; and that it is wholly immaterial that the agreement of the railway company was only by parol, and not under seal. The rent paid by the Clay Cross Company was still rent paid for the stable, and could not be recovered back upon the ground that the agreement was imperfect. Treating, therefore, the stable as a separate tenement and the subject of separate occupation, the following reasons satisfy me that the subject of the agreement was the occupation and possession of the stable itself, and not the mere easement and right to put horses in it. First, the language, "use and occupation of a stable by the

(1) Law Rep. 7 Q. B. 90.

(2) It was stated by counsel on the argument that the Clay Cross Company really consisted of but one person.

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permission of the landlord," is the usual and regular language when the thing itself is let. Although the words are "a stable," and not "the stable," as soon as the subject of the agreement was made certain by a particular stable being used, the two descriptions would mean the same thing; I should myself read the words "a stable for the accommodation of four horses" as indicating a particular stable; but this would be immaterial as soon as it was certain what stable formed the subject which the agreement was to apply to. It is worthy of notice that the same words "permitting to use and occupy" are used as regards the offices, and as to them the possession was, no doubt, given up. Secondly, by the terms of the agreement rent is to be paid. The word "rent" generally means what is paid by a tenant to his landlord for the occupation of the property of the latter, and carries with it the right of distress upon what is let. Thirdly, the tenant is to deduct property tax from the rent. But he can only deduct property tax because he pays it, and he only pays it because he is assessed to it, and he is only assessed to it because he is the occupier. Fourthly, the tenant is not to make any other deductions from the rent. This must refer, among other things, to the poor-rate; the clause is almost an invariable one in leases and agreements, and that is its recognized meaning. The tenant thus is not to deduct poor-rate, that is, he is to pay it himself; but this is because he is rated to it, and he is rated to it because he is the occupier. Thus the agreement of the parties, so far as I can collect, is that the tenant is to pay poor-rate; but the present decision is that the landlord is to pay poor-rate. Fifthly, the tenant is to give up "possession of the said stable" at a month's notice. But, unless he has had possession of the stable, how is he to give it up to the railway company. The railway company are always in possession of it. And the clause in the agreement on this subject is very precise, for provision is made for a payment of a proportionate part of the rent if the notice did not agree with the rent day, and for the notice being served upon the executors and administrators of the tenant (I before mentioned that the Clay Cross Company was said to consist of one person), or might be given by affixing it upon a conspicuous part of the stables. This last clause is a usual one in leases and agreements, and is of great service when premises are

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left empty and the tenant cannot be found, or there is at the time no personal representative; and it shews almost conclusively that the railway company could not lawfully take possession of the empty stables, and would be trespassers if they did so without this notice; and yet they are said to be always in possession.

Treating, therefore, the stable as a separate tenement and capable of separate occupation, I think that to hold that the agreement set out does not make the Clay Cross Company the occupiers would introduce great uncertainty into the law of rating, and on that account I have added the above remarks.

I do not think that the cases of *Rex* v. *Trent and Mersey Navigation* (1) (a limestone quarry) and *Reg.* v. *Marquis of Salisbury* (2) (tolls) govern the present case. Indeed they have little or no bearing upon the question of who is in the actual possession of such a tenement as a stable.

It is found as a fact in the case that none of the bye-laws are material to the question of occupation. And it seems hardly reasonable to suppose that the bye-laws could be made for such an object as would affect the possession of a particular stable under an agreement. It is also to be noticed that the words of the agreement as to bye-laws are that the tenant will observe the bye-laws, rules, and regulations to be made for the government and use of *the railway station, premises, and conveniences.* This can hardly mean for the government and use of the stable let; it may well mean a use of platforms, open spaces, gateways, &c., which may interfere with the convenience of the occupier of the stable, but not give a right to the railway company to interfere with the occupation and possession of the stable itself without due notice. If the rest of the agreement gives an independent possession to the tenant, such a clause ought to have a meaning not inconsistent, if it can have a consistent meaning.

The Court being equally divided,

Judgment affirmed.

Attorney for plaintiffs: *R. F. Roberts.*

Attorney for defendants: *J. C. F. Warington Rogers.*

(1) 4 B. & C. 57. (2) 8 Ad. & E. 716.

CATTLE *v.* THE STOCKTON WATERWORKS COMPANY.

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July 5.

Negligence—Injury to Real Property—Consequential Damages to Third Person having a Contract for Work on the Property—Illegality—Rights of Wrong-doer.

Defendants, a waterworks company, under their Act laid down one of their mains along and under a turnpike road, made under an Act which declared the soil to be in the owners of the adjoining land, subject only to the right to use and maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, and wanting to connect his land on either side, K. employed plaintiff, at an agreed sum, to make a tunnel under the road. In doing the work, it was discovered that there was a leak in the defendants' main higher up the road, and on the plaintiff digging out the earth, the water from the leak flowed down upon the work and delayed it, so as to cause pecuniary damage to the plaintiff, for which he brought an action against defendants:—

Held, that, assuming K. could have maintained an action against defendants for injury to his property (as to which the Court gave no opinion), the damage sustained by plaintiff by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave plaintiff no right of action against defendants.

The tunnel was formed by digging through half the width of the road, forming the tunnel, and then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor and the trustees:—

Held, assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent plaintiff who was engaged in it from recovering damages for a wrong.

DECLARATION that defendants, being a water company, so negligently laid down under a certain turnpike road their pipes for supplying water to a district, and so negligently kept and maintained the pipes in such insufficient repair, and in such imperfect and leaky condition, that, while plaintiff was lawfully constructing for reward to the plaintiff a tunnel across the turnpike road, and was lawfully using the road for such purpose, the pipes leaked, and large quantities of water flowed into the road, and upon the plaintiff's workings, and flooded them, and plaintiff was hindered and delayed in the work, and suffered great loss.

Pleas: 1. Not guilty. 2. That plaintiff was not lawfully constructing the tunnel. 3. That the grievances were caused by the act of plaintiff.

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Issue joined.

At the trial, before Amphlett, B., at the last Leeds spring assizes, on the facts stated in the judgment, the plaintiff had a verdict for 26*l.*, with leave to defendants to move to enter a nonsuit, the Court to have power to draw inferences of fact.

A rule was obtained accordingly, on the ground that there was no evidence of negligence to make defendants liable, and that plaintiff, as a trespasser, was not entitled to maintain an action for the damages resulting from his own act.

June 17. *J. W. Mellor* shewed cause.

Waddy, Q.C., and *Cave*, in support of the rule.

The arguments are sufficiently noticed in the judgment. The following cases were cited in addition to those noticed by the Court: *Mersey Docks* v. *Gibbs* (1); *Reg.* v. *Longton Gas Co.* (2); *Hammond* v. *St. Pancras* (3); *Blyth* v. *Birmingham Waterworks Co.* (4); *Dunn* v. *Birmingham Canal Co.* (5); *Vaughan* v. *Taff Vale Ry. Co.* (6); *Jones* v. *Festiniog Ry. Co.* (7)

Cur. adv. vult.

July 5. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. This was an action tried before my Brother Amphlett at Leeds, when the plaintiff had a verdict for 26*l.*, subject to leave to move to enter a nonsuit.

The facts proved, so far as material, were as follows: The defendants are a waterworks company, incorporated under an Act of Parliament, and they had, under powers conferred on them by the Act, laid down and maintained one of their main pipes along and under a turnpike road. This road was formed under a Turnpike Act (8), by one of the clauses of which the soil of the road is declared to be the property of the owners of adjoining land, subject only to the right to use and maintain the turnpike road over it. A gentleman of the name of Knight was owner of

(1) Law Rep. 1 H. L. 93, 107.
(2) 2 E. & E. 651; 29 L. J. (M.C.) 118.
(3) Law Rep. 9 C. P. 316.
(4) 11 Ex. 781; 25 L. J. (Ex.) 212.
(5) Law Rep. 8 Q. B. 42.
(6) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(7) Law Rep. 3 Q. B. 733.
(8) 19 & 20 Vict. c. xxxix. s. 17.

the soil on both sides of the turnpike road, at a spot where the natural surface of the ground formed a valley, which the turnpike road crossed on an artificial embankment. This caused the surface of the road to be considerably above Mr. Knight's land on each side, but still left a descent on the road to that embankment. It was discovered afterwards, though at the time it was unknown to all parties, that one of the joints of the defendants' pipe, situate higher up the declivity, was, from some cause or other, defective, and left a considerable aperture through which water escaped. Whilst the soil remained undisturbed it acted as a dam to keep in the water, and but little escaped; what did escape flowed down beside the pipe or through the soil, and rendered the soil in and under the embankment full of water. From thence it no doubt oozed away through the subsoil, but in such a way that no one observed it.

Mr. Knight was desirous of making a tunnel through his soil under the road, so as to procure for himself a passage from his premises on one side of the road to his premises on the other; and this as owner of the soil he had a perfect right to do, provided he did not interfere with the road above him or the defendants' right, acquired under their Act, to keep their pipes there. He proposed to do this in a very usual way, called, we believe, "cut and cover." That is, he meant to make a cutting across part of the road, necessarily, of course, pro tanto, interfering with the public right of way for the time, then to build his tunnel below, replace the soil, and make good the road above it, and then proceed to cut through the other parts of the road, and make the rest of the tunnel in the same manner. He applied for and obtained the consent of the surveyor of the highways and of the road trustees, on the usual conditions that he should take proper precautions to prevent any danger to the public from this operation.

One point made on behalf of the defendants was that, notwithstanding this consent, the obstruction of the highway, though only partial and for a limited time, might have been made the subject of an indictment (though a very vexatious one), and consequently it was said no one could recover for any damage sustained in carrying out such an operation. We need not determine whether there would have been any defence to the supposed indictment,

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for, even if it might have been maintained, we think that the partial obstruction of the highway did not render the whole proceeding so illegal as to prevent those engaged in it from recovering damages for a wrong. This point was disposed of on the argument, and need not be further noticed.

Knight having made these arrangements, entered into a contract with Cattle, the now plaintiff, that Cattle should do the whole work for a lump sum. Cattle accordingly began the work, and when he had cut in some little way he came on the water lodged in the soil, which, as is now known, came from the defective joint in the defendants' pipe; and as he cut further in, and so removed the soil which dammed back the water, the flow of water increased and his works were obstructed.

Notice was given to the defendants, but the evidence leaves it in doubt at what time. It does, however, appear that the defendants for some time, whether long or short, after they had notice of the mischief, neglected to take any step to examine their pipe, and repair it if out of order. At last they did examine it, and found the leak as above stated, and repaired it. The plaintiff then completed his contract, but he was delayed and put to expense; and, by agreement between the parties at the trial, the damages, if he was entitled to recover, were assessed at 26*l*.

On the argument before my Brothers Mellor, Lush, and myself, the plaintiff's counsel contended that, according to the doctrine laid down in *Fletcher* v. *Rylands* (1), the defendants were under an obligation to keep in the water in their pipes, and therefore that it was not necessary to prove negligence in fact in the defendants; but that, at all events, negligence was clearly shewn from the time they had notice of the mischief, in not taking immediate steps to repair it.

The defendants' counsel contended that the doctrine of *Fletcher* v. *Rylands* (1) did not apply to a case like the present, where the defendants were authorized by statute to make and maintain the pipe; and that the damages were assessed on the supposition that the defendants were liable for the damage during the whole time, and consequently, if the plaintiff were entitled to recover only for a part, there should be a new trial to ascertain the quantum.

(1) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.

If it were necessary to decide these questions, we should require further time to consider, as we are not as yet quite agreed on the principle of law applicable to such a case. But there is another point, on which we are agreed that the rule must be absolute to enter a nonsuit.

Assuming, for the present, what we purposely leave undecided, that Knight, if himself doing the work, might have maintained an action in his own name for this damage, and even assuming that he might, under the circumstances that exist, have maintained the action in his own name and recovered the amount as trustee for Cattle, on the ground that he would have had to bear this loss, if Cattle had not by his contract indemnified him against it, the question arises, can Cattle sue in his own name for the loss which he has in fact sustained, in consequence of the damage, which the defendants have done to the property of Knight, causing him, Cattle, to lose money under his contract? We think he cannot.

In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that, in such a case as that of *Fletcher* v. *Rylands* (1) the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley* v. *Gye* (2), Courts of justice should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts." In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as

(1) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.

(2) 2 E. & B. at p. 252; 22 L. J. (Q.B.) at p. 479.

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far as our knowledge goes, there was none that could have been cited.

The two cases which go furthest in allowing a right of action to one injured in consequence of a breach of a contract with a third person, or of a breach of duty to a third person, are *Langridge* v. *Levy* (1) and *Lumley* v. *Gye*. (2) In the first, the plaintiff was a son, whose hand was shattered by the bursting of a gun which had been sold to the father for his, the son's, use, with a false and fraudulent representation that it was a safe one. But the Court below and the Court in error both carefully point out, as the ground of their judgment, that "as there was fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." (3) In *Lumley* v. *Gye* (2) the majority of the Court held that an action would lie for maliciously procuring a third person to break her contract with the plaintiff. But all three of the judges who gave judgment for the plaintiff relied upon malicious intention. It would be a waste of time to do more than refer to the elaborate judgments in that case for the law and authorities on this branch of the law.

In the present case there is no pretence for saying that the defendants were malicious or had any intention to injure anyone. They were, at most, guilty of a neglect of duty, which occasioned injury to the property of Knight, but which did not injure any property of the plaintiff. The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract, in consequence of this injury to Knight's property. We think this does not give him any right of action.

Rule absolute.

Attorneys for plaintiff: *Sharpe & Ullithorne, for Dodds & Co., Stockton.*

Attorneys for defendants: *Iliffe, Russell, & Iliffe, for Dunn & Watson, Darlington.*

(1) 2 M. & W. 519; affirmed in error, 4 M. & W. 337.

(2) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

(3) 2 M. & W. at p. 532; 4 M. & W. at p. 338.

[IN THE EXCHEQUER CHAMBER.]

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June 15.

TREHARNE *v.* LAYTON AND OTHERS.

Will, Construction of—"*Dies leaving no Issue*" *read* "*having had no Issue.*"

The testatrix by her will gave her estate real and personal unto M. H. for her sole use during her life, and after her death to her children in equal parts; and in case M. H. dies leaving no issue, the whole of the property to go to the next of kin:—

Held, affirming the judgment of the Queen's Bench, that the words "leaving no issue" must be construed "having had no issue."

APPEAL from the decision of the Court of Queen's Bench discharging a rule to enter a verdict for the defendants.

The action was in ejectment to recover possession of tenements situate at Clay Hill, in the county of Hertford.

The defendants as landlords defended for the whole.

The cause was tried before Kelly, C.B., at Hertford spring assizes, 1874.

Jane Clifford, formerly of Clay Hill, made and executed her will on the 19th of June, 1863, as follows:—

"I, Jane Clifford, of Cedar Cottage, Clay Hill . . . do make and declare this to be my will and testament in the manner following: I order that all my just debts, funeral expenses, and charges of proving this my will, be in the first place fully paid and satisfied, and after payment thereof all the rest, residue, and remainder of my goods, chattels, debts, ready money, effects, and other my estate whatsoever and wheresoever, both real and personal, I give and bequeath the same, and every part and parcel thereof, unto my granddaughter Martha Hudson, for her sole use during her lifetime, and after her death to her children in equal parts. And I do hereby order my granddaughter Martha Hudson to allow my brother Robert Robins everything necessary during his lifetime in her own house, or my granddaughter Martha Hudson to allow my said brother fifteen shillings per week so long as he shall live. In case my granddaughter Martha *dies leaving no issue*, the whole of the property goes to the next of kin, with the understanding that they the next of kin do allow

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my brother Robert Robins fifteen shillings per week during his life."

Martha Hudson married the plaintiff on the 27th of July, 1864.

The testatrix died on the 29th of January, 1867.

In April, 1868, a male child was born to the plaintiff and Martha Treharne (formerly Hudson), and lived for a few hours only. No other child of the marriage was born alive.

Martha Treharne died on the 6th of June, 1872.

The property sought to be recovered was freehold property of Jane Clifford and passed by her will.

The verdict was entered for the plaintiff. Kelly, C.B., reserved leave to enter a verdict for the defendants, on the ground that there was no evidence of sufficient title in the plaintiff to enable him to maintain the action.

A rule was afterwards obtained pursuant to leave reserved.

The rule was argued on the 21st and 23rd of November, 1874, and the Court (Blackburn, Mellor, and Lush, JJ.) discharged the rule on the ground that the phrase "leaving no issue" must be construed as "having had no issue."

C. H. Turner (*Murphy, Q.C.*, with him) for the defendants. There are cases in which, no doubt, the words "leaving issue" have been construed to mean "having had issue," but in such cases these words were so construed in order to carry out the intention of the testator, for if they had been read in their natural sense such an interpretation might have disinherited the issue. *White* v. *Hill* (1), *Ex parte Hooper* (2), *Bryden* v. *Willett* (3), *Re Thompson's Trusts* (4), *Sheffield* v. *Kennett* (5), are cases in which it has been found necessary to put such an interpretation on such words. The rule, however, is not inflexible, and the intention of the testatrix in the present case can be best carried out by construing the words "leaving no issue" in their natural sense, for it never could have been the intention of the testatrix, that, by the event which has happened, her estate should pass away from her

(1) Law Rep. 4 Eq. 265.

(2) 1 Drew. 264; 21 L. J. (Ch.) 402.

(3) Law Rep. 7 Eq. 472.

(4) 5 De G. & Sm. 667; 22 L. J. (Ch.) 273.

(5) 27 Beav. 207; 4 De G. & J. 593.

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next of kin and go over to a stranger. The application of the rule here would work a great injustice, and defeat the intention of the testatrix. If the rule is inflexible, it ought to be overruled by the Court of Error. In *Watson's Trusts* (1) James, V.C., disapproves of *Bryden* v. *Willett.* (2) *Watson's Trusts* (3), *Hedges* v. *Harpur* (4), *Bythesea* v. *Bythesea* (5), and *Young* v. *Turner* (6), are cases in which "leaving" has been construed to mean "leaving at the time of death."

Horton Smith (*Lumley Smith* with him), for the plaintiff, was not called upon.

CLEASBY, B. We think that the authorities applicable to this case are so clear and so strong that we should not be justified in saying that they are wrong. The position they lay down is, that where an estate is vested in children after a gift to a parent, then the gift over in case of the parent dying "without leaving issue" must be read "having had no issue" in order to carry into effect the intention of the testator: and this rests upon the highest authority and goes back further than the case of *Maitland* v. *Chalie* (7), which was a decision of Leech, V.C. He says: "In this case a clear vested interest is in the first place given to the children of a daughter attaining twenty-one; if in the clause which gives the property over on failure of children of the daughter the word "having" be read for "leaving" the whole will will express a consistent intention to that effect." Then he says: "I feel myself bound by the authorities," and he refers to *Woodcock* v. *Duke of Dorset* (8), which was, no doubt, a case of settlement, but we cannot disregard it. That case was in the time of Lord Thurlow. Then we have the distinct authority of Parker, V.C., in *Re Thompson's Trusts* (9), who, in dealing with the case expresses himself thus: "I think that this case comes within the authorities cited in support of the petition. The will gives a life estate and then clearly a vested interest in the children; and if any child

(1) Law Rep. 10 Eq. at p. 39.
(2) Law Rep. 7 Eq. 472.
(3) Law Rep. 10 Eq. 36.
(4) 3 De G. & J. 129.
(5) 23 L. J. (Ch.) 1004.
(6) 1 B. & S. 550; 30 L. J. (Q.B.) 268.
(7) 6 Madd. 243, at p. 250.
(8) 3 Bro. C. C. 569; 3 V. & B. 82, (*c*).
(9) 5 De G. & Sm. 667; 22 L. J. (Ch.) 273.

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dies under twenty-one leaving issue, to the issue of that child. Thus far everything is vested; and then occurs the clause, 'in case the said Martha Oliver shall leave no child or children, or leaving such, all of them shall happen to die under age and without issue,' in which case he gives the fund over. It is said that if the word 'leave' be understood in its ordinary sense, the gift over takes effect, for Martha Oliver had no children who survived her. It appears to me that the testator's intention was to give this fund over only in case the previous limitation should fail." And then he adds this remark, which is so just and applicable to all cases of this description: "But I may observe an observation that may always be made in cases where there is this kind of question, that the testator never contemplated the event which has happened of a child attaining twenty-one and dying in the lifetime of the tenant for life. He assumed the child would have lived." And then he says, "I consider the construction is clear according to the authorities." And he refers to *Maitland* v. *Chalie* (1), the case decided by Leech, V.C., which he says is clearly in point. In addition to these decisions we have that of Kindersley, V.C., in *Ex parte Hooper* (2), and Wood, V.C., in *White* v. *Hill* (3), which bring the authorities down from the time of Lord Thurlow (1792) to the present time without dispute. At all events, I speak for my learned Brothers as well as for myself, we do not feel justified in overruling the decision of the Court of Queen's Bench, based on a long series of authorities; the judgment therefore must be affirmed.

GROVE, J. The counsel for the defendants admits that the current of authority is against his contention, but he asks the Court of Appeal to disregard the decisions and give judgment for what he alleges to be a reasonable view of the law. I think it would introduce endless confusion if we were to set aside a long series of authorities which have been acted upon.

DENMAN, J. I think, looking at the subject-matter of this appeal, we ought not lightly to overrule a long current of high authority. I agree with the judgment of my Brother Cleasby.

(1) 6 Madd. 243. (2) 1 Drew. 264. (3) Law Rep. 4 Eq. 265.

POLLOCK, B. I am of the same opinion. I will only quote what was said by Lord Ellenborough, C.J., in *Isherwood* v. *Oldknow*. (1) "It has been sometimes said communis error facit jus, but I say communis opinio is evidence of what the law is, not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the groundwork and substratum of practice, upon which powers of this sort have been erected and acted upon for a long time." No principle for the construction of wills has been more firmly settled and acted upon than that which it is now sought to controvert.

AMPHLETT, B. I have always considered that the canon of construction which has been applied to this will was established upon authority it was impossible to gainsay. The counsel for the defendants has been unable to adduce a single case at variance with the uniform current of decisions which established the principle, that where a gift to the children is a vested gift it will not become divested by the use of the words, "in case the parent dies without leaving issue." There has always been a question, whether, when children did not take a vested, but only a contingent gift, the same rule would apply. I think it is impossible not to see that in *Bryden* v. *Willett* (2) there was some doubt whether there was a gift to the children, but I think Malins, V.C., was of opinion that there was a vested gift to the children. He mentioned a case before the Court of Appeal, *Sheffield* v. *Kennett* (3), in which there was undoubtedly a contingent gift to the children, and in his judgment he disapproved of that case. Then there is a dictum of James, V.C., in *Re Watson's Trust* (4), which Mr. Turner contended was in his favour; but that also was a case in which there was a contingent gift to the children, and James, V.C., was evidently addressing his mind to the opinion expressed by Malins, V.C., as to the case in the Court of Appeal, in which the gift was contingent. He entirely agreed with the judgment of the Court of Appeal, and dissented from the opinion expressed by Malins, V.C. He was not considering the case of a gift to children which had

(1) 3 M. & S. 396.
(2) Law Rep. 7 Eq. 472.
(3) 4 De G. & J. 593.
(4) Law Rep. 10 Eq. at p. 39.

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vested. We have no decision nor dictum contrary to the principle which, as I have mentioned, governs this case. Nor is this principle in the construction of wills the sole invention of the courts of equity; so long ago as 1814 a similar point came before the Court of Queen's Bench. In *Marshall* v. *Hill* (1) there was a gift to the use of John Marshall, if John Marshall should die leaving no son or sons, to the use of James Marshall and others. Lord Ellenborough, C.J. (2), observed that the meaning of "leaving" in the devise seemed to be "having had," and not leaving in the ordinary sense, and Bayley, J., added that the language of the Court in *Moone* v. *Heaseman* (3) was extremely strong, for Willes, C.J., said, "that if there were any doubt on the words which charged the devisee with the payment of a gross sum, the subsequent words, 'in case all the three daughters die before their mother, that it shall descend to the heirs of the mother,' had put beyond all dispute and plainly shewed the intention of the testatrix. For if she intended that the daughters should be only tenants for life, and consequently that it should go to the heirs of the mother whether the daughters died before their mother or not, it would have been most absurd in her to say that it should go to the heirs of the mother in case the daughters die before her." I would also mention that, whether it was right or wrong originally to have adopted the construction that "leaving" meant "having," there is a great deal to be said in favour of that construction. Perhaps in some cases it may be better to adhere to the very words used by the testator; but the object of construing a will is to carry out the intention of the testator, and it by no means follows that reading the word "leaving" as "having had" would not in the majority of cases carry out the intention of the testator. In the present case I think it is pretty clear that, if the testatrix had foreseen the events that have occurred, she would not have vested the estate in a child who lived only for a few hours. But take another case: suppose Martha Hudson had had a child who died in Martha's lifetime, leaving children, they would not take upon the construction contended for by the defendants. Thus the Courts have come to the conclusion that in cases of this kind the intention of the

(1) 2 M. & S. 608. (2) 2 M. & S. at p. 615.
(3) Willes, 138.

testator is more likely to be carried out by construing the word "leaving" to mean "having had." The rule of construction is not altogether without reason, and I am of opinion that the judgment of the Court below ought to be affirmed.

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Judgment affirmed.

Attorneys for plaintiff: *Ravenscroft, Hills, & Woodward.*
Attorney for defendants: *W. W. Brown.*

NESBITT, APPELLANT; THE BOARD OF WORKS OF THE GREENWICH DISTRICT, RESPONDENTS.

June 5.

Metropolitan Management Act, 1855 (18 & 19 *Vict. c.* 120) *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Enforcing Payment of Expenses of paving—Apportionment of Expenses conclusive.*

The principle on which the expenses of paving a new street have been apportioned amongst the adjoining owners by a district board, pursuant to 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, cannot be questioned before any tribunal.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. 43.

A complaint was preferred by the respondents against the appellant, that he did neglect and refuse to pay 21*l.* 1*s.* 1*d.*, being the amount charged upon and to be contributed by the appellant as the owner of a certain house and premises fronting, and certain land abutting upon, a certain street called Vanbrugh Park Road, East, in the parish of Greenwich, pursuant to a resolution and order of the respondents for defraying the estimated costs and expenses of paving the street, the same being a new street within the meaning of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120 (1)), and the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102).

(1) By 18 & 19 Vict. c. 120, s. 105, "in case the owners of houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and

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The following facts were proved:—The street called Vanbrugh Park Road East, is a new street under the Metropolis Management Act, 1855 and the Metropolis Management Act, 1862, and is within the district of the respondents.

On the 16th of April, 1873, a resolution was duly passed by the respondents, whereby it was resolved: "That this board deem it necessary and expedient that (amongst other streets) Vanbrugh Park Road East, being a new street within the meaning of s. 105 of the Metropolis Management Act, 1855, be severally formed and paved . . . . and the several owners of houses forming such streets and of the land abutting thereon charged with such expenses according to an apportionment to be made by the board."

Pursuant to the above-mentioned resolution, the surveyor of the respondents estimated the amount of the costs and expenses of forming and paving Vanbrugh Park Road East, at the sum of 447*l.* 14*s.* 9*d.*, and the respondents apportioned the same amongst the owners of land and houses abutting on the street by a sub-

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in any of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board) . . . ."

By s. 77 of 25 & 26 Vict. c. 102, "where any vestry or district board shall, under the powers given by s. 105 of 18 & 19 Vict. c. 120, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as owners of the houses therein, provided it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any costs and expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years; and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

sequent resolution, and the sum apportioned for payment by the appellant in respect of his house and premises was 21*l.* 1*s.* 1*d.*

The appellant was at the date of the resolution, and still is the owner of the house and premises abutting on the street.

A notice requiring the appellant to pay the portion of the costs and expenses charged upon him pursuant to such apportionment, was duly served upon him.

[The case then stated the principle on which the sum of 447*l.* 14*s.* 9*d.* was apportioned to the several houses and land forming Vanbrugh Park Road East, but the course the case took on the argument renders it unnecessary to set it out.]

It was contended before the magistrate on the part of the respondents, that the Metropolis Management Act, 1855, and the Metropolis Management Act, 1862, had not prescribed the mode in which the apportionment of the expenses of forming and paving a new street was to be made, and that the respondents had therefore a discretion to make such apportionment in any manner they might think just, and that they were entitled under the circumstances to exercise it, as they had done, and that the amount charged to the appellant was valid and could not be impeached or called in question before the magistrate.

It was contended on the part of the appellant, that the respondents could not make their apportionment capriciously; and also that the amount charged to the appellant in the apportionment could be called in question before the magistrate.

The magistrate made an order for the payment by the appellant to the respondents of the amount claimed.

The question for the Court was, whether the apportionment made by the respondents of the estimated costs and expenses of forming and paving the street was binding upon the magistrate, or whether he had power to inquire into the correctness of the principle on which it was made.

J. Brown, Q.C. (*J. Digby* with him), for the appellant. By s. 105 of 18 & 19 Vict. c. 120, if any district board deem it necessary to pave a new street they shall pave the same, and the owners of houses forming the new street "shall on demand pay to the board the amount of the estimated expenses of providing and laying the

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pavement (such amount to be determined by the surveyor for the time being of the board). Then, by s. 77 of 25 & 26 Vict. c. 102, the owners of land abutting on a new street shall be liable to contribute to the expenses of paving a new street as well as the owners of houses; but the owners of land are to be charged in a less proportion than the owners of houses. And the amount apportioned is to be recovered either at law or in a summary manner before justices. The question is, whether the principle on which the expenses have been apportioned on the owners of houses and lands is binding on all parties, so that it cannot be reviewed before justices. If the apportionment is bad it cannot be enforced: *Whitchurch* v. *Fulham Board of Works* (1); or if the new street is a highway repairable by the inhabitants at large, the owners of the adjoining houses may dispute their liability to contribute towards the expenses of paving it: *Hesketh* v. *Local Board of Atherton.* (2) If when the surveyor has apportioned the expenses on an erroneous principle it cannot be reviewed before justices, the owners of the houses are utterly without remedy.

Manisty, Q.C. (*Willis* with him), for the respondents, was not heard.

COCKBURN, C.J. Without expressing any opinion whether the principle is right or wrong upon which the board have proceeded, I think the magistrate had no jurisdiction to inquire into the principle on which the apportionment is made. The legislature intended to leave the apportionment in the discretion of the board, and their discretion is absolute.

BLACKBURN, J. I am of the same opinion. I think the board have authority to apportion the amount, and if they do it wrongly the legislature have given no appeal against their decision. Whether in this case they have or have not applied the proper principle I have not made up my mind, but I am clearly of opinion that neither we nor the magistrate are made a court of appeal from the decision of the board, so long as it keeps within the duty which the legislature has intrusted to it. If the board exceeded its jurisdiction the apportionment is void, but so long

(1) Law Rep. 1 Q. B. 233. (2) Law Rep. 9 Q. B. 4.

as it keeps within its powers a mistake committed by it is as irremediable as a mistake made by the House of Lords.

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MELLOR, J. I am of the same opinion. I think the apportionment was within the jurisdiction of the board, and I see nothing that enables us, or the magistrate, to interfere, so long as the board keeps within its jurisdiction.

FIELD, J., concurred.

Judgment for the respondents.

Attorneys for appellant: *H. Nisbet, Rooke, & Daw.*
Attorney for respondents: *J. Spegen, Greenwich.*

THE QUEEN ON THE PROSECUTION OF THE OVERSEERS OF CORRINGHAM, RESPONDENTS, *v.* ROLLETT, APPELLANT.

July 5.

Highway—Exemption from Liability to repair Highway—Evidence of Custom to exempt—Proof of Consideration.

The parish of C. contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners and occupiers in which had never in the memory of man paid highway rates, nor done team work nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it:—

Held, by Cockburn, C.J., Quain and Field, JJ. (Lush, J., dissenting), that the above circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits.

ON an appeal against two poor-rates made respectively the 29th of September, 1873, and the 18th of November, 1873, for the parish of Corringham, in the Gainsborough Union, in the parts of Lindsay, in the county of Lincoln, to the quarter sessions held in January, 1874, the sessions affirmed the rates subject to a case.

1. The appellant is the occupier of certain hereditaments situate in the parish of Corringham, and is rated in the two rates at the sum of 39*l.* 16*s.* 9*d.* in respect of a house and 640 acres of land.

2. As to twenty-four acres, it is admitted that there is no ground of complaint.

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3. With regard to the remainder of the hereditaments, objection was taken to the rates on the part of the appellant, on the ground that they were made to cover highway expenses and to provide for sums due from the respondents, the overseers of the parish of Corringham, by virtue of precepts from the highway board of the Gainsborough Highway District; that the hereditaments, though exempt from liability to contribute to the expenses of the highways, are rated at the same amount in the pound as the other hereditaments in the parish which are not so exempt, and that there is nothing to shew on the face of the rates how much was levied for highway, and how much for other purposes.

4. It was not disputed that the rates were made to include the highway precepts, and the following appeared to be the facts with regard to the appellant's claim of exemption. The poor-law parish of Corringham contains four townships, viz. Great Corringham, Little Corringham, Somerley, and Yawthorpe. Previously to the year 1868 each township appointed a surveyor, and levied highway rates, and maintained its own highways separately.

5. At the quarter sessions held in January, 1868, a provisional order was confirmed, by which the Gainsborough Highway District was formed; such district including, inter alia, the four above-named townships. In pursuance of this order separate way-wardens were appointed for each of the townships, and they continued to levy separate rates in each of the townships upon the property previously rated to the highways.

6. On the 11th of April, 1872, a provisional order was confirmed by the court of quarter sessions, by which the townships of Great Corringham, Little Corringham, Somerley, and Yawthorpe, composing the parish of Corringham, were combined, and it was declared that the parish of Corringham should be subject to the same liabilities in respect of all highways within it which were before maintained by the townships separately, as if all their several liabilities had attached to the whole parish of Corringham.

7. In consequence of such last-mentioned order the precepts thereafter made by the highway board of the Gainsborough district upon the parish of Corringham became payable out of the poor-rate of the parish of Corringham.

8. The hereditaments in respect of which exemption is claimed

form the principal part of a district or estate containing about 700 acres, which is known by the name of Dunstall, or Dunstall-with-Bousdale, and which is situate within the township of Great Corringham.

9. It was proved that in point of fact the owners and occupiers of Dunstall have never in the memory of man paid highway rates, or done team work, or paid any composition in lieu thereof in respect of hereditaments situate in Dunstall.

10. It was contended on behalf of the appellant that Dunstall was a hamlet situate within and forming part of the township of Great Corringham, the inhabitants of which are exempt from liability in respect of the general repair of the highways in the township.

11. Two extracts from Doomsday Book with relation to Dunstall (there called Tunestall), certified by the deputy-keeper of the records, were put in by the appellant.

The following is the translation of such extracts given in a translation of that part of Doomsday Book relating to Lincolnshire by C. Gowen Smith :—

"In Dunstall Gamel had two carucates of land rateable to gelt. The land is two carucates and a half, ten bovates of which are in the soke. Ivo has there two carucates in demesne, and two villeins, eleven sokemen, and one bordar have two carucates. There is a church, a priest, and a mill worth 2*s.* yearly, and there are seven acres of meadow. The annual value in King Edward's time was 40*s.*; it is now worth 7*l.*

"In Dunstall is one carucate and two bovates of land rateable to gelt. This land is twelve bovates (of which) four bovates are inland and six bovates soke. One villein and one sokeman hold there half a carucate. Ivor Tallibor has two carucates, for which he renders soke."

12. When the apportionment of rent-charge in lieu of tithes was made for the parish of Corringham, a separate tithe apportionment was made for the hamlet or division of Bousdale. The soil of the lane, hereinafter called Lair Hill Lane, which was alleged to be a highway, was by the apportionment subject to the payment of tithes.

13. Dunstall is also described as a hamlet in the Index to the

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Population Tables, 1851, at p. 76, and also in a return as to the Superintendent Registrar's district, ordered to be printed by the House of Commons on the 10th of July, 1847, at p. 91; both of which were put in evidence by the appellant.

14. It was contended, on the part of the appellant, first, that it was not necessary to prove the existence of a consideration for the exemption which Dunstall has always de facto enjoyed, in order to support such exemption in point of law; and, secondly, that if it were necessary to prove a consideration, the following evidence conclusively proved the existence of such consideration.

15. It was proved by seven witnesses on behalf of the appellant, whose knowledge of the locality went back to periods varying from 1825 to 1841, one of them having been for twenty years surveyor of highways for Great Corringham, that there was a road called Lair Hill Lane, running along part of the north side of the Dunstall estate, and within the boundary of the same; that the road was not a stoned road, but merely a green lane, in some places twenty yards wide, in parts fenced on both sides, and in parts open to the fields; that the lane opened into a field in Southorpe, and Lair Hill Lane was a road leading from Top Farm in Dunstall to Bousdale Lane, which was a highway; that there were not more than two miles of stoned roads in the parish of Corringham until after 1851, and that the occupiers of Dunstall had been in the habit of doing such slight repairs as were done to the Lair Hill Lane, viz. hacking in the ruts and levelling the road, and stoning the gatesteads upon the same.

16. It was stated by the witnesses for the appellant that as long as they were acquainted with the neighbourhood the inhabitants of Southorpe were in the habit of using Lair Hill Lane as a cartway for the purpose of carting their farm produce to Gainsborough, and that it was then the nearest road to Gainsborough, but that since the making of the Manchester, Sheffield, and Lincolnshire Railway new private roads have been made, and the Lair Hill Road not so much used as formerly.

It was proved that there were but three farm houses in Southorpe, the occupiers of which and the persons employed on the farms had been in the habit of using the road with carts, and had never been interrupted by the owners or occupiers of

Dunstall in so doing. The appellant had occupied a farm in Southorpe since 1811. The witnesses for the appellant had worked near Dunstall estate, with the exception of one named Hunt, who stated that one Porter, the occupier of one of the farms of Southorpe, who occasionally used the Lair Hill Lane in 1848, threatened to make the owner of Dunstall stone the lane, but that he replied that sooner than do that he would throw it open. None of the occupiers in Southorpe who were alleged to have used the road were called as witnesses, nor any labourer employed by the occupier.

17. It was further proved that there was a road or way leading from the township of Yawthorpe, across Tunstall to the neighbouring parish of Northorpe, and that, in point of fact, persons who had occasion to go from one place to the other used to go by the way on foot and horseback without interruption by the occupiers or owners of Dunstall. That the same was not a stoned road, and was not inclosed, but there was a regular track across the fields from gate to gate, from which, however, people used to deviate to some extent on to the adjoining lands in places where and at times when the track was in an unusually bad state; and that the occupiers of Dunstall used the track with their carts for the purposes of the farm, and to get upon the highway on the north by way of Lair Hill Lane, and on the south by way of a lane called Mike's Lane, and used to hack in the ruts and stone the gatesteads on such track.

18. Witnesses were called on behalf of the respondents from the neighbourhood of Dunstall, some of whom stated generally that they had never heard of any public highways in Dunstall, but they gave no specific evidence relating to the user of the above-mentioned roads differently from that of appellant's witnesses, with the exception that one of them stated that he had been on one occasion told by one Scott, who was the occupier of the field through which Lair Hill Lane passes after it leaves Dunstall on the way through Southorpe, that Lair Hill Lane was not a high road.

19. It was contended, on the part of the respondents, that there was no sufficient evidence that Lair Hill Lane and the bridle road across Dunstall mentioned in paragraph 17 were highways; that it

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was consistent with the evidence of the appellant that the user proved in the case of both of the roads was merely permissive, and not of right, and that being so, the appellant failed to prove any sufficient consideration for exemption from liability in respect of the repair of the highways generally in the township.

20. The quarter sessions decided that there was not sufficient evidence to shew that the roads were highways, and they therefore dismissed the appeal and confirmed the rates, on the ground that no consideration was proved for the exemption of the hereditaments from liability in respect of the highways.

The question for the Court was whether the sessions were right in dismissing the appeal on the above grounds.

May 21. *J. C. Lawrence* and *Horace Smith*, for the respondents. *Cave* and *E. Lumley*, for the appellant.

The arguments sufficiently appear in the judgments of the Court.

In addition to the cases there cited, *Reg.* v. *Ashby Folville* (1) was mentioned.

Cur. adv. vult.

July 5. The following judgments were delivered:—

LUSH, J. This is a case stated by the Court of Quarter Sessions for the county of Lincoln, upon an appeal against a poor-rate for the parish of Corringham. The rate was made for the purpose of raising, amongst other sums, an amount sufficient to provide for a precept of the highway board of the Gainsborough highway district, in which district the parish of Corringham is included.

The objection to the rate was, that a large part of the farm occupied by the appellant is exempt from liability to contribute to the highways, and that, notwithstanding this exemption, he is rated at the same amount per pound as the other occupiers in the parish who are not so exempt.

The parish of Corringham contains four townships, each of which had been accustomed from time immemorial to maintain its own highways, but in the year 1872 an order was duly made and confirmed under the Highway Act 25 & 26 Vict. c. 61, by the court

(1) Law Rep. 1 Q. B. 213.

of quarter sessions, whereby the townships were combined, and the parish declared to be subject to the same liabilities in respect of the highways within it, which were before maintained by the townships separately, as if all their several liabilities had attached to the whole parish. In consequence of this order, the precepts of the highway board were directed to the overseers of the parish, and they were required to pay a lump sum as the contributions due from the parish out of money in their hands applicable to the relief of the poor. The lands in respect of which the exemption is claimed form the principal part of a district or estate containing about 700 acres, which is known by the name of Dunstall, and which is situate within the township of Great Corringham. This district appears from the entry in Domesday Book, set out in paragraph 11, to be a hamlet, or subordinate division of the township, to which a custom to maintain its own highways may by law be attached; for a "township, or any other known portion of a parish, may by usage and custom, become so chargeable," whatever may be its extent: *Rex* v. *Ecclesfield* (1); and as a consequence of such chargeability, the district would be (presumably at least) exempt from liability to repair the other roads in the parish.

The justices found as a fact that, "the owners and occupiers of Dunstall have never in the memory of man paid highway rates, or done team work or paid any composition in lieu thereof, in respect of hereditaments situate in Dunstall." They also found that there was not sufficient evidence to shew that any of the roads in the district were public roads, and therefore found in effect, that at the present time there are no highways repairable by the district. That being so, they disallowed the claim set up by the appellant, on the ground that no consideration for the exemption was proved. It must be taken that no evidence was given to satisfy the justices that there were ever any public roads in this district; nor was there any evidence to the contrary, and the question is, whether the custom found by the justices can be upheld in the absence of affirmative proof that it had a legal origin. I am of opinion that it can, and that a legal origin ought to be presumed. I take it to be an established rule of law that every intendment is to be made in

(1) 1 B. & A. at p. 359.

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favour of ancient usage provided it be such as can have had a lawful beginning. "Customs," says Mr. Justice Blackstone (vol. i. p. 77), "must be reasonable, or rather, taken negatively, they must not be unreasonable; upon which account a custom may be good, although the particular reason for it cannot be assigned; for it sufficeth if no good legal reason can be assigned against it." And Lord Mansfield says, in *Cocksedge* v. *Fanshaw* (1), "The rule of law is, that wherever there is an immemorial usage, the Court must presume everything possible which could give it a legal origin." For this reason it is not necessary in pleading a custom to state how it originated. It is sufficient to allege the fact that it existed from time immemorial. This was the point decided in *Rex* v. *Ecclesfield*. (2) An indictment was preferred against the inhabitants of a parish for the non-repair of a road. The plea alleged that the duty of repairing the particular road lay by immemorial custom in the inhabitants of a township in the parish within which township the road lay. A verdict having passed for the defendants, a motion for judgment non obstante veredicto was made, on the ground that the plea was bad for not stating the consideration for the alleged custom; but the Court held that the plea was in conformity with precedent, and that the consideration need not be alleged. It follows that, as the consideration in such a case need not be alleged and need not be proved, but the custom being a reasonable one, a sufficient consideration for it is to be presumed. The rule in question received a striking illustration in the case of *Reg.* v. *Barnoldswick*. (3) There a parish, consisting of five townships, being indicted for non-repair of a road in Admergill, one of the townships, pleaded a custom for each of the five to repair its own roads, and alleged that the road in question ought to be repaired by Admergill and not by the parish at large. It was proved that the other four townships had ancient roads which they had always separately repaired, but there was no evidence that Admergill ever had a public road before 1804, when the road in question was made as a turnpike road. Since 1816 it had been repaired by some, though not by all, the inhabitants of the township. Parke, B., directed the jury that there was evidence from

(1) 1 Doug. at p. 132. (2) 1 B. & A. 348.
(3) 4 Q. B. 499, 502.

which they might find that the custom which prevailed in four-fifths of the parish prevailed in the other also, adding: "There is a good foundation for the custom on a presumed bargain, made before the time of living memory by the inhabitants of each of the townships, that each should take on itself the repairs of its own roads. It is not necessary there should have been beyond the time of living memory some highway within the district, for there may be a perfectly valid custom in point of law, that the inhabitants of either township should repair any high roads which might from time to time become public." The jury found in favour of the custom, and this Court, without giving any opinion upon the larger proposition (which was not necessary to the case) affirmed the ruling of the learned baron, to the extent of holding, that it was not necessary to prove that there were any ancient highways in the district, but that it was sufficient that, consistently with the evidence, there might have been some. It is to be observed that the township was held liable to maintain the modern road, an obligation which the learned baron considered to be involved in the supposed bargain. That case appears to me to be the exact counterpart of the case before us. In that it was sought to enforce the supposed bargain on one side; in this it is sought to enforce the bargain on the other. If, before 1816, Admergill had been rated towards the repairs of the roads in the other townships, all that would have been proved was, that it had never had any surveyor and had never contributed to any road repair, and yet it is difficult to see how the decision could properly have been otherwise than it was in 1843. For the fact that since 1816 the majority of the inhabitants had taken up the repair of the road, which was a modern one, added nothing substantial to the case. The material ground for holding Admergill to be a party to the supposed bargain, must be found in the immunity which it had always enjoyed from the burden of the roads in the other townships; it being an admitted fact that each of the other townships had immemorially borne the repairs of its own roads without contribution from Admergill. Whether the direction of the learned Baron as to the supposed bargain was in its entirety correct or not is immaterial. If it was, the custom here relied on must have been held valid, even though it had been *proved* that

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there never was an ancient road in Dunstall; if it was not, and the bargain must be supposed to have been made when highways actually existed in the district, then, according to the judgment of this Court, it must be presumed, there being no evidence to the contrary, that there were such roads. On either supposition a sufficient consideration to support the custom must be taken to have existed. A custom such as the one in question is compounded of a benefit and a duty, of exemption from the rate for roads beyond, in consideration of the maintenance of roads within, the district. The one is implied from the existence of the other, and as proof of immemorial usage to do the duty implies title to the benefit, so proof of immemorial enjoyment of the benefit implies obligation to do the duty. The customary exemption being established, it cannot matter that there happens at the present time no duty to be done. There is no reason for holding that the exemption should cease, because the roads have fallen into disuse, which would not equally apply to relieve from the duty should it become more onerous by increased traffic and dedication of new roads. The burden may at times greatly outweigh the benefit, or the benefit may greatly outweigh the burden. The theory on which such a custom is based supposes the bargain to be in perpetuity, and to hold it to be permanent or fluctuating, according as it is balanced or not by the accidents of the time, would be productive of uncertainty and mischief.

Two cases remain to be noticed which my learned Brothers regard as inconsistent with those views. The first is *Freeman* v. *Read*. (1) There the tything of Walcott, which claimed to be exempt from the highway rates of the parish, had always repaired its own roads (which, however, were only green lanes requiring very slight repairs), and had always been exempt from contribution to the other roads in the parish. The jury found for the tything, and the only question raised was, whether there was any evidence to go to the jury of the exemption of the tything from the highway rates of the parish. The Court held there was, though the liability was very small. I am unable to trace in this case anything bearing upon the present, except that the Lord Chief Justice observed that a sufficient consideration was

(1) 4 B. & S. 174; 32 L. J. (M.C.) 226.

proved, and Wightman, J., that *perhaps* no one of the ingredients by itself would have exempted the parish: the ingredients being, 1st, immemorial exemption of the tything; 2ndly, non-repair by the parish; 3rdly, repair of the tything roads by the tything. But the question raised in this case was not present to the mind of the Court, and nothing, therefore, can fairly be implied from this language, which was addressed only to the facts before them.

The other case, *Dawson* v. *Willoughby-with-Sloothby* (1), is of a different character, and seems to me clearly distinguishable from the present case, upon grounds which were recognized in, and explained by Lord Ellenborough in, the case I have already cited of *Rex* v. *Ecclesfield.* (2) The facts were these. Mawthorpe was a hamlet in the parish of Willoughby, and had always been assessed to the poor-rate, church-rate, sewers-rate, and tithes in and as part of that parish. But it had, as far as living memory went, been assessed to the highway rates, as well as to land tax, assessed taxes, and property tax to and as part of the adjoining parish of Well. From 1828 to 1841 the highways in Mawthorpe were repaired by the surveyor of Well jointly with the roads of that parish, but from that date, by private arrangement with Well, the occupiers of lands in the hamlet had repaired the roads amongst themselves, except the East Lincolnshire Railway Company, which had always paid their highway rates to Willoughby parish. "The only ground of exemption," says Cockburn, C.J., "put forward by the appellant, an occupier of land within the hamlet, was that the latter, though part of the parish of Willoughby, is, as to the repair of the highways and as to rates made for that purpose, united to the adjoining parish of Well. But it appeared to us that, giving full effect to the statement that as far as living memory went Mawthorpe had always contributed to the highway rates of Well, and the highways had always been repaired by the latter parish, yet that these facts could not alter the liability of Mawthorpe to be assessed to the highway rate of the parish of which it forms a part. No such thing is known to the law as part of one parish being united to another parish for the purpose of the repair of the highways, although it may in some cases happen that a parish may be bound to repair the highways in a part of

(1) 5 B. & S. 920; 34 L. J. (M.C.) 37. (2) 1 B. & A. 348.

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another parish, if a good and continuing consideration for such an obligation can be shewn. Here, however, no such consideration is shewn." Then, after discussing the question whether there was sufficient evidence that Mawthorpe was originally a hamlet repairing its own highways, and stating that the facts were not sufficiently cogent to warrant the Court in arriving at that conclusion, the Lord Chief Justice proceeds: "We think, therefore, that the proper inference to be drawn from the facts is that the present state of things originated in an arrangement made at some remote period between the parishes. And as such an arrangement, being founded on no consideration beyond that of convenience, would not be binding longer than it was acquiesced in by all parties, we are of opinion that the parish of Willoughby is entitled to insist upon its rights to treat the hamlet as part of the parish for the repair of the highways, and to assess it accordingly." Two questions were here decided by the Court under the power conferred upon it to draw all inferences of fact. First, that Mawthorpe was not a hamlet which had from time immemorial repaired its own highways. Secondly, that no consideration was shewn for the alleged obligation of Well to repair the roads in Mawthorpe, so that if Willoughby had been indicted for the non-repair of this road, that parish could not have set up the liability of Well as a defence. From the latter finding it follows that no consideration was shewn for the payment by Mawthorpe of highway rates to Well or for their exemption from the rates of the parish of Willoughby, to which it belonged. This case illustrates the distinction pointed out by Lord Ellenborough in *Rex* v. *Ecclesfield* (1), and is in strict accordance with the case of *Rex* v. *St. Giles, Cambridge* (2), cited in that case. The distinction is between the liability of a parish, township, or hamlet, to repair its own roads and the liability to repair the roads in a foreign parish, township, or hamlet. In the one case consideration need not be alleged, but may and ought, if nothing to the contrary be shewn, be presumed; in the other the consideration must be alleged and proved. "All customs," says Lord Ellenborough (3), "are local, and confined to particular places. There cannot be a custom in one place to do

(1) 1 B. & A. 348. (2) 1 B. & A. at p. 354.
(3) 1 B. & A. at p. 360.

something in another. The land in a particular place, and the inhabitants in respect thereof may be charged by custom for matters within the place; but custom will not apply to matters out of it. Lord Coke observes, at the end of *Gatenward's Case* (1), that the custom there alleged was insufficient and repugnant, because it was alleged that the custom was that every inhabitant of the town of S. had used to have common in a certain place in the town of H., which was another place. . . . If, therefore, the inhabitants of one district can be charged at all for a matter out of their district (upon which it is not here necessary to give any opinion, inasmuch as custom will not apply to the matter, and so they cannot be charged by custom), the only mode of charge will be that of prescription; and as no common intendment can be presumed for such a charge, it will be necessary to shew some special matter whereby a lawful beginning may be intended." I cannot regard this case as an authority for the position for which it is quoted; on the contrary, the doctrine taught by it is, that a custom in a district to repair the roads within its own area is primâ facie a good custom, and needs no evidence of consideration to support it; but that a custom to repair the roads in a foreign district is primâ facie a bad one, and can only be supported, if at all, by proof of consideration.

For these reasons I am of opinion that the order of sessions ought to be quashed.

The judgment of Cockburn, C.J., and Quain and Field, JJ., was delivered by

FIELD, J. (2) The question raised in this case is, whether the appellant, who is the occupier of lands which form the principal part of a "district or estate" called Dunstall, situate in the township of Great Corringham, in the parish of Corringham, in Lincolnshire, is liable to be assessed for the repair of those highways in the township in question which are situate beyond the limits of Dunstall.

The facts found by the sessions are, that the poor-law parish of Corringham contains four townships, Great Corringham, Little Corringham, Somerly, and Yawthorpe; and before the year 1868

(1) 6 Rep. 60.

(2) The judgment was read by Lush, J.

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each of these townships appointed a separate surveyor, and maintained the highways within its limits, and levied highway-rates for that purpose separately from the others. That in 1868 the townships in question were formed with other parishes into a highway district, but each township continued to levy separate highway-rates, and appointed separate waywardens, until 1872, when by an order duly made the four townships were combined, and two waywardens were elected for the whole parish, which it was declared should be subject to the same liabilities, in respect of those highways within it, which were before maintained by the townships separately as if their several liabilities had attached to the whole parish. It appeared upon the evidence that Dunstall was mentioned in Doomsday Book, and in subsequent documents, in such a manner as to lead to the fair inference that it was a known district, including other lands besides those occupied by the appellant, and within which a custom to maintain its own highways separately from the rest of the parish might by law have existed: *Rex* v. *Ecclesfield* (1); but there was no evidence to shew that there was in fact any highway within it which the inhabitants of the district had ever maintained; the only evidence being that there were two roads in Dunstall which the justices found not to be highways, and which had been repaired to the slight extent rendered necessary, such as hacking in the ruts, &c., by the occupiers of Dunstall. There was no evidence of any separate appointment of surveyors by Dunstall, or of the making of any separate rates; but it was found that the owners and occupiers of Dunstall had not in the memory of man paid highway-rates, or done statute work, or paid any composition in lieu thereof in respect of hereditaments within the parish; and upon these facts the justices found that there was no consideration proved for the exemption of the appellant's land from liability.

Now it is clear that the appellant is the occupier of land locally situate within the parish (which has the liability of the separate townships attached to it) and as such is primâ facie liable to be assessed to the repairs of the highways within it, as the charge of such repair by law falls upon the parish in default of any usage or custom to charge a smaller territory. The only exemption of the

(1) 1 B. & A. 348.

appellant from such a charge, applicable to the facts of this case, would therefore be that Dunstall was a known district having the capacity to undertake the liability of repairing the roads within it, separately from the inhabitants of the rest of the township, and that from time immemorial there had been a custom or usage within it to that effect. The form in which this exemption would be pleaded is correctly stated in the case of *Freeman* v. *Read* (1), and the question in the present case, shortly stated, is, whether there is sufficient evidence upon which a jury ought reasonably to find such an averment proved. I think not. In the case of *Freeman* v. *Read* (1) there was, as here, evidence that Walcot (the smaller division) was a tything or district such as Dunstall in the present case; that it had never contributed to the repairs of the highways in the parish of Swindon, nor had the parish of Swindon contributed to the repairs of the highways in Walcot; but there was the fact, which is wanting in the present case, viz. that the inhabitants of Walcot had always repaired the highways within it, separately from the inhabitants of the parish, and in giving judgment the Court specially relied upon the concurrence of all these three elements as necessary to establish the exemption. Again, in the case of *Dawson* v. *Willoughby* (2), the parish of Willoughby had, as in the present case, never sought to assess the hamlet of Mawthorpe to the repairs of the highways in the parish, and the Court was at first inclined to draw the inference from that circumstance alone, that Mawthorpe had originally been a hamlet repairing its own highways; but upon consideration they said that although, if the hamlet of Mawthorpe had in fact so repaired, the case of *Freeman* v. *Read* (1) would have been an authority to shew that such would be the proper inference to be drawn, they declined, in the absence of that fact, to draw such inference, and held that the exemption was not established. In the case of *Reg.* v. *Barnoldswick* (3), Admergill, one of five townships forming the parish of Barnoldswick, claimed exemption from contributing to the repairs of the highways without its limits. It was not proved that it had ever had any surveyor, or contributed

(1) 4 B. & S. 174; 32 L. J. (M.C.) 226. 10 Jur. N.S. 158

(2) 5 B. & S. 920; 34 L. J. (M.C.) 37. 11 Jur. N.S. 240

(3) 4 Q. B. 499.

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to the general parochial burdens, or that there had ever been any immemorial public road within it which they had repaired; but it was shewn that the other four townships similarly situate had always separately repaired their highways, and that Admergill itself had since 1816 repaired the road there, under indictment, which had come into existence in 1804; and the jury having found, upon all the facts of the case, that Admergill was bound by custom to repair its own roads, Parke, B., directed a verdict of guilty, but reserved the point whether it was essential to the proof of an immemorial usage "that ancient roads should be proved to have existed;" and this Court held that the exemption might be established without such proof, Coleridge, J., expressly limiting his judgment to the question reserved by the judge.

The question in the present case, substantially asked by the justices, seems to be whether they were right, under the circumstances in this case, in holding that the exemption was not established; and I think that they were. The mere circumstance that the occupiers of the district in question have never contributed to the payment of rates or to the repairs of the highways in the other parts of the township is not, I think, sufficient by itself to establish the existence of an immemorial usage and custom existing in Dunstall to charge it with the repairs of its own highways, and thus to exempt it from contribution to the repairs of the highways without its limits. I do not find any case in which that mere circumstance has been held sufficient, and for these reasons I am of opinion that the decision of the quarter sessions must stand.

Order of sessions affirmed.

Attorney for prosecution: *A. R. Oldman.*
Attorneys for defendant: *Collyer, Bristowe, & Co.*

LOWE, JUDGMENT CREDITOR; BLAKEMORE, JUDGMENT DEBTOR; THE WHITEHAVEN SHIP BUILDING COMPANY, GARNISHEES; WOODBURN AND OTHERS, AND H. BOLLAND, CLAIMANTS.

1875
July 5.

Garnishee Order Nisi, Effect of—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 61, 62, 63—*Bankruptcy of Judgment Debtor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16—"*Secured Creditor.*"

11 Ch D. 223

A judgment creditor, who has obtained and served on the garnishee a garnishee order nisi, under s. 61 of the Common Law Procedure Act, 1854, before a petition for liquidation has been presented by the judgment debtor, is a creditor holding a security on the debtor's property within the meaning of s. 12 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71.)

Ex parte Greenway (Law Rep. 16 Eq. 619) dissented from.

RULE, calling upon Messrs. Woodburn, Pemberton, and Sampson, and H. Bolland to shew cause why the amount of 45*l.* 14*s.* 10*d.* paid into court under an order of Master Hodgson dated the 12th of April, 1875, should not be paid out to the plaintiff, the judgment creditor, or his attorney.

May 27. *Gully* shewed cause.

Horne Payne in support of the rule.

The facts and arguments and the cases cited sufficiently appear in the judgment of the Court.

Cur. adv. vult.

July 5. The judgment of the Court (Cockburn, C.J., and Lush and Field, JJ.) was delivered by

LUSH, J. This was a rule obtained by the plaintiff Lowe, the judgment creditor of the defendant Blakemore, calling upon all the claimants, in form, but in substance, upon Bolland, who was the receiver in bankruptcy of the judgment debtor, to shew cause why the amount of 45*l.* 14*s.* 10*d.* paid into court under the order of Master Hodgson of the 12th of April, 1875, should not be paid out to the plaintiff.

The 45*l.* 14*s.* 10*d.* in question is the amount of a debt due by the garnishees to the judgment debtor, and was paid in under these circumstances: The plaintiff obtained a judgment for 310*l.* against the defendant Blakemore, on the 24th of March, and upon

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the 2nd of April he obtained the ordinary garnishee order under s. 61 of the Common Law Procedure Act, 1854, by which, upon the usual affidavit that the garnishees were indebted to the judgment debtor, "all debts" due from the latter were ordered "to be attached to answer the judgment debt"; and by the same order the garnishees were ordered to shew cause, on the 12th of April, why they should not pay to the plaintiff the debt due from them to the defendant.

This order nisi was served upon the garnishees on the 2nd of April, and on the 5th the judgment debtor presented his petition for liquidation by arrangement or composition with his creditors under the Bankruptcy Act of 1869. On the 10th of April the claimant Bolland was appointed receiver of this estate; and upon the 12th of April, (the day for shewing cause under the order nisi) the garnishees having appeared and admitted the debt, the amount of it was claimed by Bolland, on the part of the general creditors, as a part of the bankrupt's estate; and Master Hodgson, by his order of that day, ordered the garnishees to pay 45*l.* 14*s.* 10*d.* into court, and called upon the claimant Bolland to appear on the 19th of April and state the particulars of his claim, and maintain or relinquish the same; and on the 20th of April, the money having been paid into court, and the parties having appeared, the summons was referred to the Court by Huddleston, B., at the request of the Master, in consequence of doubt entertained by the latter whether the case fell within the authority of *Emanuel* v. *Bridger*, decided in this Court (1), or of *Ex parte Greenway* (2); or whether, if those authorities are in fact in conflict, this Court was prepared to adhere to its own decision; and the rule was therefore obtained for that purpose.

Now the answer to this question depends upon the construction to be put upon s. 12 of the Bankruptcy Act, now in force; and of the garnishee sections of the Common Law Procedure Act, 1854 (61st and following sections); but, in order to ascertain the meaning of the Legislature in s. 12, it is necessary to trace back the current of bankruptcy legislation and the authorities upon it a little nearer to their source. One of the general objects of bankruptcy legislation is to secure for division amongst the general

(1) Law Rep. 9 Q. B. 286. (2) Law Rep. 16 Eq. 619.

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body of creditors the whole of the property of the bankrupt at the time of his bankruptcy, and no more; but, by the Bankrupt Act, 1849 (12 & 13 Vict. c. 106), s. 184, it is enacted, "That no creditor having security for his debt, or having made any attachment in London or in any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy." Now, at the time this Act was passed, execution by fi. fa was the ordinary process in use by which a creditor could enforce satisfaction of his debt by seizure and sale of his debtor's goods; but, in 1854, the judgment creditor's remedy for the satisfaction of his debt was extended by giving him a process of execution by attachment of and order to pay to him any "debts" due by a third person to his judgment debtor; and very soon after this extension, the question arose whether a creditor, in the pursuit of this remedy, became at any and what period of the process a creditor "having security" within the meaning of s. 184 for his debt, and if so, whether he was entitled to any "lien" upon the property; and in 1855 this question was decided by this Court in the case of *Holmes* v. *Tutton* (1) in the sense that a creditor who had, under s. 62 of the Common Law Procedure Act, 1854, served the order nisi (which by that section binds the debt), was a creditor having security within the meaning of s. 184, but had not a "lien" within the exception, and so the order served operated as a security binding the garnishee and debtor, but did not operate as against the assignees of the latter. In that case the Court treated it as clear, that a right of this nature, so binding the debt in the hands of the garnishee, was a "security" within the meaning of the Act, the words being wide enough to extend also to "executions, mortgages, and liens;" and the principal difficulty in that case arose upon the question of 'lien," which they considered must amount to something equivalent to a mortgage by conveyance or contract, and at least to

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346.

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more than the mere binding of the property, whether by delivery of the writ to the sheriff under the enactments of the Statute of Frauds, or the service of the garnishee order nisi under the Common Law Procedure Act. In *Tilbury* v. *Brown* (1) Crompton, J., after consulting the rest of the Court, applied the principle of *Holmes* v. *Tutton* (2) to a case where the order for execution had been served under s. 63, holding that no lien even then existed; and the case of *Holmes* v. *Tutton* (2) was referred to with approval by Bramwell, B., in *Turner* v. *Jones* (3), and by this Court in *Murray* v. *Arnold* (4) and *Emanuel* v. *Bridger*. (5) In the case of *Holmes* v. *Tutton* (2) the attention of the Court was specifically directed to the cases decided under s. 16 of the Statute of Frauds (29 Car. 2, c. 3), in which it was held that the delivery of the writ to the sheriff, which is to "bind," only operates as between the parties, but does not take the property in the goods out of the debtor, that not being altered until the sale, but they still held them to be bound under the garnishee order nisi, now included in the word "security." But in 1869 the Act of 1849 (12 & 13 Vict. c. 106), under which these decisions were made, was repealed, and, in lieu of s. 184 of that Act, the following provisions were made by s. 12 of the Act of 1869 (32 & 33 Vict. c. 71), viz, that "where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt proveable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debts except in manner directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed." Soon after the passing of this Act, the Courts of Exchequer and Exchequer Chamber in *Slater* v. *Pinder* (6) and the Lord Chancellor and Lords Justices in *Ex parte Rocke* (7), held that s. 184 of the Act of

(1) 30 L. J. (Q.B.) 46.
(2) 5 E. & B. 65; 24 L. J. (Q.B.) 346.
(3) 1 H. & N. 878; 26 L. J. Ex. 262.
(4) 3 H. & S. 287; 32 L. J. (Q.B.) 11.
(5) Law Rep. 9 Q. B. 286.
(6) Law Rep. 6 Ex. 228; in error, Law Rep. 7 Ex. 95.
(7) Law Rep. 6 Ch. 795.

1849 was not in language or in spirit to be found in the Act of 1869, and that an execution creditor, who had seized but not sold the debtor's goods, was a creditor "having security" within the meaning of s. 12 of that Act; and in *Ex parte Williams* (1) the Lords Justices were called upon to construe s. 12 with reference to the rights of an execution creditor who had delivered his writ to the sheriff (which delivery, by the operation of s. 16 of the Statute of Frauds, as above observed, "bound" the goods as against the debtor); and they laid down the other boundary of the rule, and held that he was not a creditor having security within s. 12, as he had no qualified property in the goods in the same manner as he would have had upon seizure.

At this stage of judicial decision this Court was invited, in *Emanuel* v. *Bridger* (2), to reconsider the question discussed in *Holmes* v. *Tutton* (3) as applied to a judgment creditor, who had not only obtained and served the order, attaching the debt, and calling upon the garnishee to shew cause why he should not pay it to him instead of to the judgment debtor, but had also obtained an order absolute to pay under s. 63; but this Court construed s. 12 of the new Bankruptcy Act in the same way that it had construed s. 184 of the Act of 1849, and held that in that position the creditor was within the protection of s. 12, as having security for his debt, justifying itself further by the language of s. 16 of the new Act, in which a "secured creditor" is defined, at all events for certain purposes, as a creditor having any "charge," within which larger words the right in question seemed clearly to fall. But the construction of s. 12 of the Act of 1869 about the same time came before the Chief Judge in Bankruptcy in the case of a creditor who, before the bankruptcy, had obtained and served the order of attachment and garnishee summons, but who had not obtained the order absolute to pay; and that learned judge held that such a person was neither a creditor holding security within the meaning of s. 12, nor a secured creditor within subs. 5 of s. 16, as holding a "charge;" and that is the case of *Ex parte Greenway* (4), to which the master has referred, and upon the

(1) Law Rep. 7 Ch. 314.
(2) Law Rep. 9 Q. B. 286.
(3) 5 E. & B. 65; 24 L. J. (Q.B.) 346.
(4) Law Rep. 16 Eq. 619.

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authority of which it was argued before us that the trustee in liquidation in the present case was entitled to this debt as part of the bankrupt's estate. But in the present case the garnishee proceedings are precisely in the same stage as they were in *Holmes* v. *Tutton* (1), and this Court, in *Emanuel* v. *Bridger* (2), recognising the authority of *Holmes* v. *Tutton* (1), pointed out that a garnishee order, by which a particular debt is attached "to answer the judgment," is a right much more specific in its character than that created by the mere delivery of a writ of execution to the sheriff, as in *Ex parte Williams* (3); and rather like an actual seizure, and at the same time carefully guarded itself from the supposition that its decision depended upon the fact that the order to pay had been made. We have now, in deference to the opinion of a judge for whom we entertain so much respect, again considered the authorities, but we can come to no other conclusion than that the cases in this Court were rightly decided; and in consequence we hold that the plaintiff is a "secured creditor" within the meaning of s. 12 of the Act of 1869, and the rule, therefore, to pay the debt in question to the plaintiff must be made absolute, but without costs.

Rule absolute.

Attorney for judgment creditor: *A. B. Carpenter.*
Attorneys for claimants: *Cunliffe & Beaumont.*

(1) 5 E. & B. 65; 24 L. J. (Q.B.) 346.
(2) Law Rep. 9 Q. B. 286.
(3) Law Rep. 7 Ch. 314.

BEGBIE *v.* THE PHOSPHATE SEWAGE COMPANY, LIMITED.

1875
May 31.

Action for Breach of Contract—Failure of Consideration—Money had and received—Fraud.

The defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to the plaintiff for 15,000*l.* the sole and exclusive right to use and exercise the patent in B. The plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The directors of the defendants' company were not aware that the patent for B. had not been obtained. The object of the plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company, under the belief that, if the company bought of the plaintiff the right sold to him by the defendants, the company would be entitled to the exclusive use of the process in B. The plaintiff sued the defendants to recover back his 15,000*l.*, on the ground that, as there was no exclusive right to the use of the process in B., the consideration had failed:—

Held, that no action could be maintained,—1. On the ground that, although the defendants ostensibly sold the exclusive right to use the process at B., yet, the plaintiff's object being to float a company and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and that he had, in fact, obtained that for which he had paid the 15,000*l.*;—2. On the ground that the plaintiff, being aware that no exclusive right to use the process in B. could be obtained, had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company.

Affirmed on appeal (10 B.D. 679).

DECLARATION for money had and received by the defendants for the use of the plaintiff, and for money due on accounts stated.

Plea: Never indebted. (1)

At the trial before Cockburn, C.J., at the London sittings after Trinity Term, 1874, a verdict was found for the plaintiff for 15,000*l.*, with leave to the defendants to move.

A rule was afterwards obtained to enter a verdict for the defendants, on the ground (amongst others) that there was no total failure of consideration to entitle the plaintiff to recover under the money counts, and that the plaintiff's claim was founded on fraud.

May 6. *Butt, Q.C., Fischer, Q.C.*, and *Trevelyan*, shewed cause,

(1) The declaration contained counts founded on the agreement of the 19th of January, 1871, to which many special pleas were pleaded; it is not, however, necessary further to notice the pleadings, as the plaintiff's counsel rested his case at the trial on the common counts.

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and cited the following cases: *Edwards* v. *M'Leay* (1); *Rawlins* v. *Wickham* (2); *British & American Telegraph Co.* v. *Albion Bank* (3); *Gray* v. *Lewis* (4); *Kennedy* v. *Green* (5); *Farmer* v. *Russell* (6); *Feret* v. *Hill.* (7)

Sir H. James, Q.C., and *Lanyon*, in support of the rule, cited *Kelner* v. *Baxter* (8); *Gurney* v. *Womersley.* (9)

The course of the trial, the facts, and arguments sufficiently appear in the judgment of the Court.

Cur. adv. vult.

May 31. The judgment of the Court (Cockburn, C.J., and Quain and Field, JJ.) was delivered by

COCKBURN, C.J. This case was heard in last term before my Brothers Quain and Field and myself. The facts were as follows:—A Mr. Hartzberg Hartmont, with whom the plaintiff, Begbie, was associated, had obtained, in 1868, from the Haytian government, on condition of negotiating for it a loan of 420,000*l.*, the grant for fifty years of an island called Alta Vela, which is within the territories of the republic, for the purpose of procuring the phosphate of alumina, which the island produces in considerable quantities, and which, when treated under a given process, is alleged to be available for defecating sewage, and utilising it for the purpose of manure.

The interest in this concession was afterwards, by deed of the 1st December 1868, transferred, on terms which it is not material for the present purpose to state, to the firm of Peter Lawson & Son; and a company having been formed for the purpose of working the concession, the interest of Lawson & Son was made over to such company, together with certain patents which had been taken out for the process by which the phosphate of alumina was to be applied to sewage. This company, the defendants in the present action, was incorporated in May, 1871, under the name

(1) Cooper's Cases in Chan. 308; on appeal, 2 Swan. 287.
(2) 3 De G. & J. 304; 28 L. J. (Ch.) 188.
(3) Law Rep. 7 Ex. 119, 122.
(4) Law Rep. 8 Eq. 526; Law Rep. 8 Ch. Ap. 1035.
(5) 3 My. & K. 699.
(6) 1 B. & P. 296.
(7) 15 C. B. 207; 23 L. J. (C.P.) 185.
(8) Law Rep. 2 C. P. 174.
(9) 4 E. & B. 133; 24 L. J. (Q.B.) 46.

of the Phosphate Sewage Company, Limited; its purpose being to apply the phosphate of alumina under the patented process to the defecating and utilising of sewage. Mr. Hartmont, whose name has already been mentioned, took an active part in these arrangements, and was the holder of a large number of shares in the newly-formed company. In the summer of 1871 he became a director of the company. It is not disputed that the undertaking was thus far a bonâ fide and legitimate one, or that the company was honestly intended to carry out the purposes for which it professed to be constituted.

In the course of 1871, the improvement of the drainage of the city of Berlin and the utilisation of its sewage having about this time excited some attention among its inhabitants, a committee of gentlemen, who had united themselves for such purpose, sent over a Dr. Henzel to this country, to obtain information on the subject. Henzel having put himself into communication with his countryman, Mr. Julius Liebert, a witness on the late trial, Liebert obtained an introduction to Hartmont, at that time a director of defendants' company. It occurred to Liebert and Hartmont that a company with limited liability might be advantageously formed for applying the defendants' process to the sewage of Berlin. Having found certain gentlemen at Berlin who were willing to become directors of a company to be formed, Hartmont and Liebert arranged the following scheme:—It was agreed that Begbie, the plaintiff in the present action, acting however herein, though ostensibly in his own interest and behalf, in reality entirely on account of Hartmont, should purchase from the defendants' company for the sum of 15,000*l.* the exclusive right to use their process in the city of Berlin, or on land within the suburbs of that city. Begbie in his turn was to convey the interest so acquired to Liebert for 30,000*l.*, being an advance of 15,000*l.* on the sum to be paid by him to the defendants. Liebert was then to convey the interest so acquired by him for the like sum of 30,000*l.* to one Montefiore, a clerk in Hartmont's office, in trust for the future Berlin company.

To carry this scheme into effect, three agreements were signed by the parties concerned on the 19th of January, 1871. By the first of these, being an agreement between the Phosphate Sewage

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Company, Limited, and Robert Spear Begbie, the Phosphate Sewage Company "agree, in consideration of the sum of 15,000*l.* to be paid to them by the said Robert Spear Begbie, as hereinafter mentioned, to grant to the said Robert Spear Begbie, or any other person or company whom he shall name in that behalf, the sole and exclusive right or licence to use and exercise in any part of the city of Berlin, in the kingdom of Prussia, or in or upon any lands in the suburbs of the said city, for the purpose of the said city, but not otherwise, the process for treating sewage by means of the phosphate of alumina, belonging to and used by the said Phosphate Sewage Company Limited, and all other processes of treating sewage (if any) used by the said company, whether patented or not." And the said Phosphate Sewage Company, Limited, "further agree, when thereunto required, and at the cost of the said Robert Spear Begbie, or such other person or company as aforesaid, to execute to him or them such formal licences or grants of such patents and privileges as he or they may find necessary or expedient for the more perfectly securing the benefit of the grant thereof hereby agreed to be made." The company further agree "to supply to Begbie, or his nominees, at the market price of the day, all the phosphate of alumina which he or they may require for the purpose of carrying out the said phosphate of alumina process in the said city of Berlin, and in and upon any lands in the suburbs of the said city."

The next agreement, being between Begbie and Liebert, following the foregoing in terms, conveyed the interest of Begbie to Liebert.

The third agreement,—which purported to be made between Liebert and Montefiore, "contracting on behalf of a company intended to be forthwith incorporated, with limited liability, under the Companies Acts of 1862 and 1867, to be called the Berlin Phosphate Sewage and Manure Company, Limited," after reciting "that Liebert, in view of the establishment of the company hereinafter referred to, had acquired or had entered into agreements for the acquisition of the business of the principal contractors for scavenging in the said town of Berlin, and had also entered into agreements for the purchase of land in the kingdom of Prussia, a list of which agreements so entered into was added by way of schedule"; and that

"it was intended that the benefit of the several agreements hereinbefore recited and referred to should be assigned to the said company upon the terms hereinafter expressed,"—went on to provide that immediately after the incorporation of the intended company Liebert should sell, and the said intended company buy, all the rights and interest of the said Julius Liebert in the said several agreements for the sum of 30,000*l.*, payable in cash; the said sum to be payable, as to 15,000*l.*, part thereof, out of the first moneys that should be received from the allotment of shares of the said company, and so soon as such moneys were received—and as to 15,000*l.*, the residue thereof, on or before the 20th day of February next, with interest at 5*l.* per cent. in case of non-payment at these dates. Liebert, "at the cost of the intended company, was to execute or procure the execution of all such assignments and deeds, and do all such notarial and judicial acts as the intended company may require for the completion of the assignment of the benefit of the said several agreements, and for the effectual vesting of the full benefit thereof respectively in or in trust for the company, in such manner and form as shall be necessary, having regard to the law of Prussia and of England." Montefiore was to incur no personal liability under the agreement; and the agreement was to be binding so soon as the company should be incorporated, and should adopt it; but in case the said company should not be incorporated, or if incorporated should not adopt this agreement before the 20th day of February next, the agreement was to cease and determine, and neither party was to be deemed to have incurred any liability by reason of their having entered into the same.

On the ensuing day, the 20th of January, articles of association were entered into for the formation of a company, to be called the Berlin Phosphate Sewage Company, Limited, for the purpose of applying the defendants' process to the sewage of the city of Berlin; and prospectuses were soon afterwards issued in this country, as well as at Berlin, inviting applications for shares, in which the names of four gentlemen resident at Berlin, and four others resident in London, of whom three were directors of the London company, were announced as directors. These prospectuses contained the following important statement:—"To turn the whole of the

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sewage of Berlin to the greatest profit, the company has secured the exclusive right, for Berlin, of using the phosphate of alumina process, belonging to the Phosphate Sewage Company, which, according to the highest scientific authorities, is the only efficient precipitation process, and produces a very valuable manure." The appeal thus made to the public was successful. The shares were applied for and taken up, for the most part by English subscribers, and the company was duly formed. Out of the money paid for shares the 30,000*l.* agreed upon as the price to be given to Begbie for the exclusive right to use the company's process, was duly paid, not indeed to Begbie, who, as we have seen, was not the party really interested, but to Hartmont, who was. Of this amount, 15,000*l.* was paid by Hartmont to the London company, the defendants, in satisfaction of Begbie's obligation; the other half went into his own pocket. The 15,000*l.* paid to the company was carried to the account of dividend, which was thereby increased to 20 per cent., and distributed as such among the shareholders. This amount of dividend, together with the fact that 30,000*l.* had been paid for the use of defendants' process in a single city, had, as might naturally have been expected, the effect of raising the value of the shares in the defendants' company in the market, the expectation of which result had no doubt been one of the motives by which Hartmont, who was the holder of a great many shares in the London company, had been influenced in entering into this transaction. It appeared that Hartmont sold at this time a thousand shares in the London company, at a premium of 46*l.* a share.

Thus far all appeared to be right; but when the Berlin company, being now constituted, and having acquired land for the purpose, were about to begin working, they discovered that the London company had taken out no patent for Prussia, and consequently were not in condition to confer any right to the exclusive use of their process in the city of Berlin. Nor could this all-important deficiency be made good, the Prussian government, at all times chary in granting patents, uniformly refusing them for inventions already patented and made public in a foreign country. This being so, inasmuch as for the purpose of working the defendants' process the erection of buildings and machinery, which involved considerable outlay, was necessary, the company declined to incur

this expense without having the certainty of the exclusive use of the process.

The defendant's company having no patent for Prussia, it follows that they had no exclusive right which they could grant for the use of their process in that country, and the consideration for the 15,000*l.* paid to them for the grant of such exclusive right wholly failed.

The question, how far the want of a patent for Prussia was known to the different parties at the time of the execution of the agreement of January, 1869, and of the payment of the money by the Berlin company, becomes a material element in the inquiry.

The jury have found that the directors of the defendants' company were not aware that such patent had not been obtained. They had directed that patents should be taken out for the principal countries of Europe, and believed that a patent had been acquired for Prussia. But the jury have found—as we think rightly—on questions specifically put to them, that Begbie and Hartmont were aware of the fact at the time the agreements of the 19th of January were entered into. Liebert admitted on the trial that the fact of there being no patent for Prussia, and of the impossibility of obtaining one, had been fully known to him, adding that it was known to the Berlin directors also: the object having been, he declared, not to obtain the exclusive right to use the defendants' process, but to obtain the money of the English shareholders in order to float the company and set it going. The jury further found that the absence of a patent for Prussia was known to the directors of the Berlin company but unknown to the shareholders.

The consideration for the 30,000*l.* paid by the Berlin company having wholly failed, and 15,000*l.* of that sum having found its way into the coffers of the London company, the Berlin company claim to have the latter sum refunded, and it certainly would appear that, having received no equivalent for the money paid, the latter company are in justice entitled to have the money refunded, either by Begbie or by Hartmont, into whose hands the money was paid, or by the defendants, into whose hands it has come. The defendants, however, while unable to dispute that, as it has turned out, they are unable to confer the exclusive right which formed the

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consideration for the money paid to them, not only deny any legal liability to refund the money, but endeavour morally to justify their refusal by alleging that, the 15,000*l.* received by them having been carried into dividend and distributed among the shareholders of that day, it would be unfair on the existing shareholders, a very different body of persons, to compel them to repay the amount.

We are not called upon to express an opinion on the morality of this defence. We are alone concerned to see whether the claim of the plaintiff in this action can be maintained.

It was intimated by counsel on the trial that the action, though brought in the name of Begbie, was in reality brought by, or on behalf of, the Berlin company. Of this, however, no proof whatever was adduced, Begbie, the plaintiff, not having been called; but the fact appears probable, as it transpired in the course of the trial, that Mr. Hartmont, who had invested largely in the Berlin company, had lately resigned his shares to that company, on certain terms, one of which was that, on this action being brought and prosecuted with success, Hartmont should receive one half of the amount recovered. Be this, however, as it may, we have no judicial knowledge that the action is brought on behalf of the Berlin company, and it is therefore unnecessary to consider how far the right of that company to recover back this money may be affected by the fact, as found by the jury, that their directors knew, when the money was paid, that the defendants had no patent for Prussia, and consequently were incapable of granting the exclusive right of using their process in the city of Berlin. Nor is it at all necessary that, sitting as a court of law, we should consider what might be the position of the Berlin company as plaintiffs in a court of equity, where all parties concerned might be before the court. We can deal only with Begbie, the plaintiff on the record, and with the merits of his individual claim to have this money refunded by the defendants. Now, though it is true that the plaintiff has failed to acquire the exclusive right to the use of the defendants' process, which by the terms of his agreement with them was to be granted to him as the consideration for the 15,000*l.*, still, to any claim for the restoration of the money, by reason of failure of consideration, the obvious

answer presents itself, that the plaintiff, when entering into the agreement with the defendants and paying the money under it, was aware that there was no patent for Prussia, and that consequently no exclusive right to use the process there could be granted. All that the plaintiff—or rather Hartmont, whose instrument the plaintiff was—desired was an ostensible grant of the exclusive right, in order to make it the means of forming and floating the Berlin company. This grant, which was all that Begbie and Hartmont desired to obtain, and that for which they were willing to part with their money, they in fact got; and having got it they cannot, as it appears to us, claim to have the money returned on the ground of the consideration having failed.

Another ground of defence insisted on is that, the money having been paid for the purpose of defrauding the intended shareholders by holding out to them the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company, that no exclusive right existed or could be obtained, the plaintiff cannot maintain an action to recover back the money, on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back.

That a fraud was practised on the intended shareholders by the assurance held out in the prospectus seems clear. That the promoters believed that, if a company could be formed, and capital by that means raised, the defendants' process could be applied to the sewage of Berlin with profit, may indeed be gathered from the fact that Hartmont, having realised a large profit on the sale of shares in the London company, proceeded to invest largely in shares of the Berlin company. Nevertheless, the assurance so held out, with the view of inducing the public to take shares and pay their money upon them, being known to these parties to be unfounded, amounted to a false representation and to a fraud on the parties taking shares on the faith of such statement. Under these circumstances we are of opinion that, the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle

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of the decisions in *Simpson* v. *Bloss* (1), *Jones* v. *Yates* (2), and *Fivaz* v. *Nicholls*. (3) The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid.

We are, therefore, of opinion that the rule must be made absolute to enter the verdict for the defendants.

Rule absolute.

Attorneys for plaintiff: *Combe & Wainwright.*
Attorney for defendants: *John Holmes.*

June 14.

[IN THE EXCHEQUER CHAMBER.]

CHASEMORE AND ANOTHER *v.* TURNER.

Statute of Limitations—Unconditional Promise to pay—"As soon as we can get our Affairs arranged we will see you paid."

In an action by the payees, commenced in 1873 against one of the makers of a joint promissory note, dated the 1st of October, 1858, defendant pleaded the Statute of Limitations. At the trial the following letter from defendant to plaintiffs, dated the 29th of May, 1867 (at which time the statute had run), was put in: "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands":—

Held, by Blackburn and Archibald, JJ. (Mellor, J., dissenting), that the promise in the letter might be only conditional, and was not sufficient (without evidence to explain it) to take the case out of the statute:

Held, on appeal, reversing the judgment of the Queen's Bench, by Cleasby, Pollock, and Amphlett, BB., and Grove and Denman, JJ., that the promise in the letter was sufficient; Lord Coleridge, C.J., being of the contrary opinion.

APPEAL from the decision of the Court of Queen's Bench in favour of the defendant making absolute a rule for a new trial.

The following are the facts as stated in the case on appeal.

This action was brought against the defendant as one of three makers of a joint and several promissory note, dated the 1st of October, 1858, in favour of the plaintiffs, bankers at Croydon. (4)

(1) 7 Taunt. 246.
(2) 9 B. & C. 532.
(3) 2 C. B. 501.
(4) Neither the date of the writ, the amount of the note, nor the date when due, was given in the case; but it was

Defendant pleaded, inter alia, the Statute of Limitations.

At the trial before Martin, B., at the summer or spring assizes at Croydon, 1873, the note was proved, and a letter dated the 29th of May, 1867, from the defendant to one of the plaintiffs was put in.

"Croydon, May 29, 1867.

"My dear sir,—The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands."

The letter was admitted by the defendant's counsel, and no evidence was offered on behalf of the defendant; but it was contended that the letter did not take the case out of the Statute of Limitations.

The learned judge ruled that the letter was sufficient for that purpose, and directed the jury to find a verdict for the plaintiffs for the amount claimed; and he refused to grant leave to move, but stayed execution.

A rule was afterwards obtained for a new trial, on the ground of misdirection.

1874. June 13. *Grantham* shewed cause. The letter of the 29th of May, 1867, is a sufficient acknowledgment in writing within 9 Geo. 4, c. 14, to take the debt out of the Statute of Limitations. There is a distinct acknowledgment in it of the debt from which a promise to pay may be implied. The meaning of the letter is, As soon as our affairs are arranged, that is, our accounts and papers are in confusion, as soon as we can arrange them we will pay, and in the meantime let your clerk send us an account of how it stands. There is no condition, it is an absolute promise to pay, but at the same time stating that the affairs of the defendant and his brother are in confusion. (1)

admitted, on the argument, that the claim was barred by the statute when the letter of the 29th of May, 1867, was written. In fact, the note was at six months, for 422*l*. The writ was issued on the 27th of May 1873.

(1) It was admitted on the argument, though not stated in the case, that the note was given by the defendant, his father (who had died before May, 1867), and brother for a partnership debt.

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[BLACKBURN, J. Does it not mean, As soon as we are able to pay we will pay you?

MELLOR, J. May it not mean, I am willing to pay, give me a little indulgence?

ARCHIBALD, J. Or, As soon as we can get the money we will pay you?]

It is not for the plaintiffs to explain the letter, if there is an absolute acknowledgment it is sufficient. In *Lee* v. *Wilmot* (1) the words were, "I will try and pay you a little at a time if you will let me. I am sure I am anxious to get out of your debt; I will endeavour to send you a little next week." It was held that this was not a conditional offer, but an unqualified acknowledgment of the debt. In *Cornforth* v. *Smithard* (2) the words, "I am ashamed the account has stood so long" were held to be a sufficient acknowledgment, not restricted by an intreaty for time to pay which followed them. In *Collis* v. *Stack* (3), asking for forbearance, or merely stating matters explanatory of the sources from which the funds are to arise, were held not to be a qualification of an acknowledgment. *Sidwell* v. *Mason* (4), *Godwin* v. *Culley* (5), *Edmonds* v. *Goater* (6), and *Gardner* v. *M'Mahon* (7) are cases which shew that if there is an unequivocal admission of the debt the operation of the statute is barred, and that expressions of a hope of ability to pay, or similar expressions, do not make the acknowledgment conditional.

Garth, Q.C., and *Morgan Howard*, in support of the rule. The letter of the 29th of May is not an acknowledgment within 9 Geo. 4, c. 14. To take a debt out of the Statute of Limitations that must either be an acknowledgment of the debt from which a promise to pay is to be implied; or an unconditional promise to pay the debt; or a conditional promise and evidence that the condition has been fulfilled. In the present case the highest that it can be put at is, that there is a conditional promise to pay "as soon as we can get our affairs arranged." It lies on the plaintiffs to shew that the condition has been fulfilled; they did not do so at the

(1) Law Rep. 1 Ex. 364.
(2) 5 H. & N. 13; 29 L. J. (Ex.) 228.
(3) 1 H. & N. 605; 26 L. J. (Ex.) 138.
(4) 2 H. & N. 306; 26 L. J. (Ex.) 407.
(5) 4 H. & N. 373.
(6) 15 Beav. 415; 21 L. J. (Ch.) 290.
(7) 3 Q. B. 561.

trial, and therefore cannot recover. In *Tanner* v. *Smart* (1) Lord Tenterden, C.J., says: "Upon a general acknowledgment, where nothing is said to prevent it, a promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule, 'Expressum facit cessare tacitum' apply?" That case was followed in *Hart* v. *Prendergast* (2), where the acknowledgment was held insufficient; it was, "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." These cases govern the present.

BLACKBURN, J. My view is this. The action upon the debt is barred, and after the debt is barred a letter is written by the defendant [the learned judge read the letter]. It is now settled law, that if an acknowledgment amounts to a promise to pay, the old debt is a sufficient consideration for the new promise: it is equally well settled, that, if the promise is conditional, on the condition being fulfilled the creditor can recover; further, under Lord Tenterden's Act (9 Geo. 4, c. 14), the promise to take a debt out of the Statute of Limitations must be in writing. In this case we have to see whether the debtor has made an absolute promise. If the promise is absolute, the plaintiffs can recover; but if it is conditional only, then the plaintiffs cannot recover until the condition is fulfilled. On reading the letter, I cannot doubt its meaning to this extent: "the old account" means his (the defendant's) and his brother's account, and "we will see you paid" means "we will pay it." I cannot construe the letter as meaning "I admit being indebted to you in money, and I hope you will give me time to pay it." It seems to me to mean, "As soon as our affairs are arranged we will pay." But it is very difficult to say what is meant by "as soon as we can get our affairs arranged:" they obviously point to something as a condition to be fulfilled. I think the words do not convey any meaning plainly, and it requires some evidence to explain them. They suggest a condition of some

(1) 6 B. & C. at p. 609. (2) 14 M. & W. 741.

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kind. The plaintiffs not having shewn us what they mean, and the burden of proof being on them, they must fail as things stand. If the arrangement of affairs is shewn by evidence to mean that the attorney should raise money on mortgage for the defendant, there was a substantial condition which the plaintiffs must shew has been fulfilled; but if it means only that the book-keeper was to make out the accounts, then there was no condition. I think my Brother Martin was wrong, and the rule must be made absolute for a new trial, in order that evidence may be given to explain the meaning of the letter.

MELLOR, J. My impression is this. The letter is a document written by the defendant, and I think it contains a clear admission of a debt due. The expression "as soon as we can get our affairs arranged" is indefinite. I would give effect to the letter unless the defendant, whose instrument it is, explained it at the trial. In the absence of evidence, I cannot find any condition in it: it is not precise enough to enable me to say what its meaning is, and it lies upon the defendant to explain that which he himself wrote.

ARCHIBALD, J. I agree with my Brother Blackburn. The question is, whether the letter contains an absolute promise to pay or a promise clogged with a condition. The language may well import a condition, although we may not be able to ascertain the true construction of the letter. The fact of its being the defendant's letter does not cast upon him the burden of shewing what its meaning is. It lies upon the plaintiffs to shew that, if a condition is attached to the promise to pay the debt, it has been complied with. No assistance can be obtained from other cases. The question is as to the meaning of the letter. I cannot read it as asking for further time. If the words mean, "As soon as we can pay off certain mortgages or make some important arrangement to borrow money," there is no promise to pay absolutely. I think there ought to be a new trial, that proper evidence may be forthcoming to ascertain whether the letter contains a condition.

Rule absolute.

June 14, 1875. On appeal,

Grantham (*Hamilton* with him), for the plaintiffs, contended

that the promise to pay was unconditional; "as soon as we can get our affairs arranged," if it introduced any qualification, made the promise, instead of a promise to pay immediately on request, a promise to pay within a reasonable time which had elapsed before the action was commenced. [He cited *Sidwell* v. *Mason* (1); *Collis* v. *Stack* (2); *Gardner* v. *M'Mahon* (3); *Lee* v. *Willmot.* (4)]

[LORD COLERIDGE, C.J., referred to *Tanner* v. *Smart* (5) as laying down the principle applicable to such cases. This was adopted by Lord Wensleydale in giving judgment in the Exchequer Chamber in *Smith* v. *Thorne.* (6) The principle is admirably put by Wigram, V.C., in *Philips* v. *Philips* (7), and this is adopted by Williams, J., in *Buckmaster* v. *Russell* (8): "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for the new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But, if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."]

Tindal Atkinson, for the defendant. The burden of proof of a promise by the defendant within six years is on the plaintiffs; and if they only shew a promise to pay as soon as the defendant's affairs can be arranged, the plaintiffs must give some evidence that the affairs have been arranged. No doubt nearly six years had elapsed since the letter, when the action was brought, but no evidence was given at the trial beyond the letter, and nothing was left to the jury, Martin, B., ruling that the letter alone was sufficient. It is impossible to say that the letter contained an unconditional

(1) 3 H. & N. 306; 26 L. J. (Ex.) 407.
(2) 1 H. & N. 605; 26 L. J. (Ex.) 138.
(3) 3 Q. B. 561.
(4) Law Rep. 1 Ex. 364.
(5) 6 B. & C. 603, 606, 609.
(6) 18 Q. B. at p. 143; 21 L. J. (Q.B.) at p. 201.
(7) 3 Hare, at pp. 299–300.
(8) 10 C. B. (N.S.) at pp. 749–750.

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promise to pay on request; and if not, then, according to *Tanner* v. *Smart* (1), the plaintiffs must give some evidence that the condition, whatever it was, of the promise has been fulfilled. [He cited *Fearn* v. *Lewis* (2), *Edmunds* v. *Downes* (3), *Rackham* v. *Marriott* (4), *Edmonds* v. *Goater* (5), *Francis* v. *Hawkesley* (6), *Haydon* v. *Williams* (7), and *Cornforth* v. *Smithard.* (8)]

[LORD COLERIDGE, C.J., referred to *Hart* v. *Prendergast* (9) and the judgment of Hill, J., in *Everett* v. *Robertson.* (10)]

Grantham, in reply, referred to Best on Evidence, pp. 340–1.

AMPHLETT, B. In this case the question we have to decide is, whether the letter of the 29th of May, 1867, was a sufficient answer to the plea of the Statute of Limitations. The debt in question had, before that letter was written, been actually barred, and, therefore, the action must have failed, unless this letter is sufficient to take the case out of the statute. A great number of cases have been cited; but with great respect, I do not think it is at all necessary for us to go through or examine those cases in detail, because I quite agree with what has been stated by my Lord Coleridge, that the only use of having recourse to cases in a case of this sort is to find out what the principle of decision is, for as to the particular words used, they will convey a different meaning to different minds. Therefore I think the only useful thing is to see what the principle is, and fortunately I do not think there has been any dispute whatever in modern times as to the principle which should guide us in our determination, whether this letter does or does not take the case out of the statute. The principle I take to be this: First of all, if there be an absolute unconditional acknowledgment of the debt, that is sufficient. If that stands alone, and nothing is said about payment, the acknowledgment of the debt would imply a promise in law to pay the

(1) 6 B. & C. 603.
(2) 6 Bing. 349, 352.
(3) 2 C. & M. 459.
(4) 1 H. & N. 234; 26 L. J. (Ex.) 315.
(5) 15 Beav. 415; 21 L. J. (Ch.) 290.
(6) 1 E. & E. 1052; 28 L. J. (Q. B.) 370.
(7) 7 Bing. 163.
(8) 5 H. & N. 13; 29 L. J. (Ex.) 228.
(9) 14 M. & W. 741.
(10) 1 E. & E. at p. 19; 28 L. J. (Q. B.) at p. 24.

debt. But if there is not only an acknowledgment of the debt, but a promise to pay the debt in words, we then have to look whether the promise to pay is an unqualified unconditional promise, or whether it is a conditional promise; and if it is a conditional promise to pay, and the condition is not performed, then the mere acknowledgment of the debt will not take the case out of the statute. That is the principle laid down by Parke, B., in the case of *Smith* v. *Thorne* (1), which has been recognised by several other judges as good law; we must either find an absolute acknowledgment, or, where there is anything said about payment, a promise to pay upon request, or a promise to pay upon some event which is proved to have happened: in which cases the acknowledgment is sufficient to take the case out of the statute. So that if the condition or promise to pay is this, "If I shall have means to pay I will pay," it appears to me, that that is a condition, and that the plaintiff who relies upon the promise must prove the condition performed, and that the ability to pay has arisen; otherwise a real injustice might be done to the debtor who wishes to be honest, but at the same time does not wish to promise that which he is not able to perform. If he says merely, I promise to pay you (as in *Tanner* v. *Smart* (2)) as soon as I am able, it necessarily follows, as it appears to me, that the plaintiff must shew that the defendant is able to pay before he can rely upon the promise. In *Smith* v. *Thorne* (3) there was merely the expression of a hope to be able to pay; but I look to the judgment in *Smith* v. *Thorne* (3) for the principle. The actual facts in that case are very different from this, because the hope to be able to pay is not really a promise to pay at all; it is not a promise, because that hope may never be realised.

But looking at the principle laid down by Parke, B., let us see what the true construction of the document in the present case is: "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid." I do not think it could be contended successfully that there is not an absolute

(1) 18 Q. B. at p. 143; 21 L. J. (Q.B.) at p. 201.
(2) 6 B. & C. 603.
(3) 18 Q. B. 134, 143; 21 L. J. (Q.B.) 199, 201.

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acknowledgment of the debt. The question is, whether there is an absolute promise to pay, and the argument is this: "As soon as we can get our affairs arranged," means this: "I do not promise to pay you, but I promise to pay you when our affairs are arranged;" and it is said that is a conditional promise to pay on a certain event, and no proof has been given by the plaintiffs that that period has ever arrived. It will be as well to finish the letter before I give what my construction of the letter is. He goes on to say: "Perhaps in the meantime you will let your clerk send me an account of how it stands." Now it appears to me, looking at the whole of that letter, the true construction of the letter is this: "I absolutely acknowledge the debt is due." I think there is an implication, a necessary implication or assertion that he is of ability to pay; because he says, "As soon as we can get our affairs arranged we will see you are paid." I think the true construction of that is, that it implies an assertion that he has means to pay, and he merely wants time to have his affairs brought to a close and the account wound up. At all events it appears to me to be clear that there is no implication or expression, or intimation of a doubt of any kind that he has not the means to pay, but that he merely wants time until his affairs can be arranged. Then it is said, if that is so, still the plaintiffs ought to shew that the affairs have been arranged; granted that you are right, that there is an implication that there would be sufficient funds to pay, you have not shewn that the affairs are arranged. I think that the letter contains really an assertion that the affairs will be arranged; the necessary implication is the affairs will be arranged, and at the end of a reasonable time; and as six years, all but a few days, had elapsed when this action was brought, I think it is a fair inference for the Court to draw from the letter itself that the affairs had been arranged; and, if they had not been arranged, the burthen, as my Brother Mellor seems to have put it, would lie upon the defendant to shew that the affairs had not been arranged. I think you may imply, from the terms of the letter itself, that before the end of six years the affairs had been arranged, and, therefore, that the period at which the payment was to be made had actually arrived.

There must be cases in which, upon the face of the document, the inference would be that the time had arrived which would relieve the plaintiff from the necessity of proving it. Supposing the defendant had said this: I am able to pay the debt, and as soon as I can find time to come to your office, I promise you I will pay. Is it meant that at the end of five years the plaintiff would have to give evidence that the defendant had had no time, and was unable to come to the office. I think, on the contrary, that there the primâ facie case would be that he had had time, that he might have come, and if there was anything to countervail that the burthen would be upon the defendant to prove it. Looking at the whole of this letter, I should assume from the letter itself the defendant had really said, I will see you paid as soon as our affairs are wound up; and I think the necessary implication on the document is that he would be able to pay when they were wound up, and that the affairs would be wound up within a reasonable time. The reasonable time having elapsed, then, it appears to me the principle laid down by Parke, B., in *Smith* v. *Thorne* (1) is substantially, I may say literally, complied with.

I do not propose to examine the cases, I will only say this, that if you are to look at the cases, there are two which appear to me to be sufficient to decide the case, even if it were much less strong than it is, in favour of the plaintiffs. I allude to the cases of *Sidwell* v. *Mason* (2) and *Collis* v. *Stack* (3), particularly to the observations of Bramwell, B., in the first of those cases.

In giving my opinion I do not at all forget the difference of opinion in the Court below. There were two judges to one in the Queen's Bench for an opposite view. At the same time it must be remembered that Martin, B., by his acts expressed the strongest opinion the other way, because he refused leave to move on the point. The case therefore comes before us with high authority, and, I may say, equally balanced authority on either side, and we are bound, therefore, to exercise our own judgment unbiassed by authority on this point; and coming to it unbiassed

(1) 18 Q. B. at p. 143; 21 L. J. (Q.B.) at p. 201.

(2) 2 H. & N. 306, 310; 26 L. J. (Ex.) 407.

(3) 1 H. & N. 605; 26 L. J. (Ex.) 138.

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by authority, I am of opinion that the facts of this case take it out of the statute.

POLLOCK, B. I also think that the plaintiffs are entitled to our judgment. As the statute 9 Geo. 4, c. 14, merely alters the mode of proof, but does not in any way affect what is the character or nature of the promise which is requisite to take the case out of the Statute of Limitations, no light can be gained or thrown upon this case by reference to that statute. With regard to the cases, although we are sitting here in a Court of error, it seems to me that no great good would be gained by going through those cases and commenting upon them; and without saying I agree by any means with some that have been cited before us, it is sufficient to say I do entirely agree,—I think all of us do agree,—in what was said in the case of *Tanner* v. *Smart* (1), which was the first case which made it thoroughly understood that the effect of the promise, in order to take the case out of the Statute of Limitations, was not to revive the old debt, but to create a new cause of action. I also entirely agree with what was said by Wigram, V.C., in *Philips* v. *Philips* (2), that the result of that is, therefore, that the new promise, and not the old debt, is the measure of the creditor's right. That being so, I come to consider what is the result and fair effect of the document which was put in evidence by the plaintiffs in this case, in order to take the debt out of the Statute of Limitations. I would first say, that this does not seem to me to be a case in which any question arises as to the onus of proof. It is quite true here that it was the business of the plaintiffs to put in some document or to give some proof to take their debt out of the statute; but when we come to examine the document, we must remember that the document is a document which is written by the defendant, and then the fair rules of construction arise, which were relied on by Mr. Grantham, that, if the defendant intended to say that this document was clogged with a condition, it was his duty to shew he had expressed himself clearly so that it would be understood by ordinary persons, and by his creditor in particular, that there was such a condition. Now, the document itself is this: "The old account between us,

(1) 6 B. & C. 603, 606, 607. (2) 3 Hare, at pp. 299–300.

which has been standing for so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid. Perhaps in the meantime you will let your clerk send me an account of how it stands." With regard to there being a clear admission of the debt there is no doubt, and the only question is, whether the promise to pay is a promise which is absolute, or whether it is qualified by a condition. If there were nothing said but simply "we will see you are paid," or language far short of that, a promise to pay would be implied. Then, is there any condition which can fairly be said is called to the attention of a person who is reading that document. I think there is not, and for this reason. It is not requisite that there should be an absolute promise to pay then or upon a request; it is sufficient if it be a promise to pay within a reasonable time, or some time that may be contemplated by the person, and clearly pointed out by the language which is used by the person who is giving the promise. In this case the words which are said to be a condition are these: "As soon as we can get our affairs arranged." That, in common parlance, seems to me to mean no more than "we require some time for our convenience before we can pay; we do not intend to pay immediately." But that must be taken to mean a reasonable time. A very good illustration was put by my Brother Amphlett, and one might repeat a good many of the same kind, such as, "As soon as we change our offices;" "As soon as our books can be looked through;" in all of which cases it would be proper for a jury to infer that the parties making the statement had the means in their own hands of doing what they mentioned, and therefore a reasonable time might be said to have elapsed, if a period has passed giving them an opportunity of doing it. Then there are the words which have some bearing on the case, and which affect my mind: "Perhaps in the meantime you will let your clerk send me an account of how it stands." "In the meantime," if we are to examine the document very logically and accurately, would seem to me rather to point to a time that is sure to occur, otherwise there would be no absolute meaning in that phrase at all. On the whole, it seems to me that this document fairly and reasonably points to a promise, made by the defendant to pay after they have had the opportunity of going

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through their accounts and arranging their affairs, and so forth. It was a matter in their own hands. A reasonable time having elapsed the promise is sufficient to take the case out of the statute.

DENMAN, J. I am of the same opinion. The question here is whether the document of the 29th of May, 1867, is a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. In order to take the case out of the Statute of Limitations the document in writing relied upon must contain an acknowledgment of a debt, from which a promise to pay will be inferred, or it must contain either an unconditional promise to pay, or, if it be a promise to pay upon condition, it must be proved that the condition has been performed. Nobody I believe in this case entertains any doubt that this document is an acknowledgment of a debt—an unconditional acknowledgment of a debt,—and the only question is, whether the words "as soon as we can get our affairs arranged," make the promise to pay—which I believe also we are all agreed exists in the document—a conditional promise or not. If it be a conditional promise, then there is no evidence that the condition was performed, and therefore it would be of no avail. But the question is, whether those words, "as soon as we can get our affairs arranged," do import a condition. It would be idle for me to deny that I did entertain doubt during the argument, and it would be idle to deny that even now I entertain some doubt as to how that question ought to be decided. It is a sort of question which would perhaps be better for a jury to decide than for the Court; but inasmuch as it is a question upon the face of the writing, the Court is bound to decide it, and it is just one of those questions as to which one judge may entertain one view and another another, because it is so very much in the nature of a question of fact or a question of business arising upon a business document. My judgment is, that these words do not import a condition; that they no more import a condition than if they were somewhat analogous words, such as "as soon as the settling day is over," or, as soon as some day which the parties are in the habit of resorting to for the purpose of settling their affairs or arranging their affairs is passed. If that is so, then they are no more conditional than

would be the words "as soon as Wednesday is passed," or, "as soon as the first of July is passed." They simply allude to some time as the time required before which the payment is not to take place, and they would not import a condition. It would be useless to imagine other cases than this; we are only dealing with this case: and all I can say is, that paying the best attention to the argument I could, and scanning the words as well as I can, I come to the conclusion that here the person who wrote that document did not mean to import a condition—did not mean to intimate the slightest doubt as to whether his affairs would be arranged or not. If he had, he might have used totally different language from this, such as, "if on the arrangement of our affairs I find myself able to do so," or words of that kind. But he contemplates as a certainty that the arrangement of the affairs would soon take place, which would be consistent with the payment he promises; and the subsequent words therefore are wholly unconditional, and the document contains an unconditional promise to pay.

GROVE, J. I am of the same opinion. There has been no doubt or dispute in the argument by the learned counsel as to the principle which is to be applied to this case; nor, as far as I am aware, is there any difference of opinion in the Court as to the principle to be applied. The whole question is of the application of the principle. There being, in the unanimous opinion of the Court, an acknowledgment of the debt in this document, the sole question really is, whether the words, "as soon as we can get our affairs arranged," import any condition, or merely whether they refer to time and to mere convenience on behalf of the persons acknowledging the debt as to when their affairs will be arranged, not expressing any doubt as to any probability or expectation that the affairs are not capable of arrangement, nor indeed any doubt of the solvency of the parties, but merely that a certain time must be occupied in putting the affairs in order Now as far as I can gather in all the cases that have been cited for the defendant—and I only refer to the cases here, not as laying down the principle, which is undisputed, but as shewing how learned judges and Courts have applied the principle—as far as I can gather, though the cases are so numerous that I am far from saying that

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there may not be cases which do not come within the point to which I am about to refer; all the cases import either only a hope or expectation, which does not amount to a promise, or an absolute condition, or a degree of doubt or difficulty as to means of payment which may fairly be assumed to import a condition. The case which comes the nearest to this of all the cases that have been decided, as far as my judgment goes, and which may be cited in favour of the defendant, is the case of *Fearn* v. *Lewis*. (1) There the words were these: "Mr. Fearn's claim, with that of others, shall receive that attention that as an honourable man I consider them to deserve, and it has been and is my intention to pay them; I cannot conclude without saying I must be allowed time to arrange my affairs,"—words in themselves, it appears to me, not unlike the words (though capable of distinction, and what to my mind is a fair distinction) in the present case. The present case is, "as soon as we can get our affairs arranged." In *Fearn* v. *Lewis* (1) the statement in writing which was relied upon goes on to say, "and if I am proceeded against any exertion of mine will be rendered abortive." It is to be observed that, first of all, what the person who writes the letter says is not as in the present letter, "we will see that you are paid," but, "it is my intention to pay them." Now an intention is something different from an actual promise; it is something in the man's mind, who may intend a thing, but may be at the same time conscious that it is extremely doubtful whether he will be able to perform it. Then there comes a "but" and an "if"—"But I must be allowed time to arrange my affairs, and if I am proceeded against any exertion of mine will be rendered abortive." That seems to imply, "It is my intention to pay, but I am unable to pay at present, because if you proceed against me my exertion will be rendered abortive." Therefore it imports an assertion of present inability to pay, but an intention (which may be something more than hope, but which would not necessarily amount to a promise) to pay if the affairs are put right, and if, in fact, there is an ability to pay. There is a doubt, to say the least, if not an absolute assertion of present inability, and an intention of paying if time be given—a conditional inten-

(1) 6 Bing. 349.

tion, and a conditional intention depending upon the circumstances of a man who admits at least, to take it as fairly as it can be taken, that at present he is unable to pay. Now, is there any such "but" or "if" in the present case? The present case is, "as soon as we can get our affairs arranged we will see you are paid." They seem to me very strong and very positive words; not the slightest doubt expressed as to the ability to see the creditor paid —"we will see you are paid." Then are these words, "as soon as we can get our affairs arranged," to be read as if there were some doubt about our affairs—that there is some question whether we have a balance, or something of that sort; or is it not, "We are occupied in arranging our affairs, and do not be under any alarm, because we will see you are paid?" It seems to me that the assertion of the ability to pay is very strong, and that there is no condition imported in the mere question of time which is involved in a certain arrangement of the partnership affairs.

There are two other cases to which I will allude, and only two, which were decided in favour of the person relying on the promise; and they seem, or at least one of them seems, to go further than the present case. Of course, sitting here in the Court of Appeal we are not bound by those cases, and I only use them as shewing the application of the principle which has been held in previous cases, either to make the promise an unconditional one, or considered by the judges a conditional one. One is the case of *Lee* v. *Willmot* (1), in which the word "if" occurs, but occurs not as I read it in the sense of importing doubt of ability in himself, but doubt as to what the creditor will let him do. The words are these, "I will try to pay you a little at a time" (that may be said to import some degree of inability), "if you will let me. I am sure I am anxious to get out of your debt. I will endeavour to send you a little next week." That was held to be a sufficient promise, although there was the conditional word "if" in it, but there the conditional word was rather pleading with the creditor than an expression of inability on the part of the debtor; at all events there does seem to be some degree of doubt there expressed as to the ability to pay, because there is the prayer for time, and only a promise of an instalment. But in *Cornforth* v. *Smithard* (2)

(1) Law Rep. 1 Ex. 364. (2) 5 H. & N. 13; 29 L. J. (Ex.) 228.

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the words seem to me to go further than this case in favour of their being conditional. The words are these: "In reply to your statement of account received, I am sorry the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat." Now in that case, as in *Lee* v. *Willmot* (1), the expression in the letter was held by the judges to be sufficient to take the case out of the statute; and this last case seems to me to be a little stronger in favour of the defendant than the present, because it does seem not unreasonable to import some doubt of ability to pay. "I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat," rather importing, "Things are too flat for me now to be able to pay you, but we must wait until a turn takes place in the market." I do not think it necessary to go into the cases any further, because they seem to me to shew that the condition must really import either an inability to pay, or a doubt of ability to pay, or import something in the sense of a hope, or an intention, and not an absolute promise coupled with an apparent ability, both which seem to me to exist in the present case. Here it is, "as soon as we can get our affairs arranged we will see you are paid, and in the meantime" (that is, whilst our affairs are being arranged) "perhaps you will let your clerk send us the account." I am far from saying the case is perfectly clear; it would not be at all proper to say so; but, speaking my own opinion, I am far from saying I have arrived at the judgment I have expressed with anything like perfect certainty in my own mind that I am right; but the best opinion I can form on the subject is, that these words, "as soon as we can get our affairs arranged," do not amount to a condition; they do not amount to saying, "If we can get our affairs arranged, we will pay you;" they do not amount to an admission that the disarrangement of the affairs involves doubt as to whether the settlement will enable them to pay or not, but merely that it is something which will occupy time to get arranged: and then comes the most clear and unequivocal promise that words can make—not "hope to pay you," not "if we can arrange we will pay you," but "we will see you are

(1) Law Rep. 1 Ex. 364.

paid." It seems to me that on the whole there is a sufficiently unequivocal and unconditional promise, and this letter does revive the debt so as to take it out of the Statute of Limitations.

CLEASBY, B. I am of the same opinion. I think I should have said no more than that I concur in the conclusion and in the reasons already given, but as the learned Chief Justice who presides to-day is of a different opinion, I think I ought to state very briefly indeed my reasons for coming to the same conclusion as the judges who have already given judgment. Undoubtedly in this case there is an unconditional acknowledgment of the debt; what we are to consider is, whether there is coupled with that unconditional acknowledgment of the debt a conditional or limited promise, so as to negative the implication of an unconditional promise to pay which would in general arise from an unconditional acknowledgment of the debt. The question is not exactly, or perhaps at all, the same as has been discussed in most of the cases. We have not here to consider what is the effect of an acknowledgment, so much as what is the meaning of this letter. If we can ascertain what the meaning of it is, then we can refer to the cases as guides; but here we have to deal with the preliminary question, what does this,—taking not only the language contained in the letter itself, but having reference to any other circumstances there might be,—what does this mean? It is a question not of the effect, but of the construction, what is the meaning of this letter.

Now the facts are that two or three persons, the defendant being one of them, had made a joint promissory note as early as 1858. The facts are undoubtedly barely stated; but in 1867 we come to this, that one of these three seems to have been applied to, I do not know exactly under what circumstances, and to that application the answer which he gave was this—(it may be mentioned that the plaintiffs are bankers):—"The old account between us which has been standing so long has not escaped our memory, and as soon as we can get our affairs arranged" (that is something which they are to do), "we will see you are paid." I can only read this as referring to something which is sure to take place, not only ought to take place, but is sure to take place. It is not a condition which means something which may or may not happen, but

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a limitation of time which we may assume will be at an end before long. "As soon as it can be done," that is the meaning of it, which is not liable to be interrupted in any way, but which is a matter of course, and which may be done in a very short time, or a little longer time, still it is an act which is sure to take place, "As soon as this matter is arranged; as soon as our affairs shew what the position of things is, then we will see you are paid." I think what follows, as my Brother Pollock has mentioned, may be fairly taken into account in dealing with this, because he says, "And perhaps in the meantime you will let your clerk send me an account of how it stands." What does that mean? If it had gone on and said, "and you shall then have a cheque for the amount" (it is not going very far to read it as having that meaning, as he has said, "we will see you are paid"). "Let your clerk send it in in the meantime, so that I may be prepared and have the amount known," then I cannot help thinking we should have seen our way to the conclusion that all that was intended here was to say, "It cannot be done immediately, but let this be gone through, and then we will send you a cheque." That is the way in which I read it.

I do not intend to refer to any of the cases which have been referred to already. There is one which has not been referred to, which, although it is a case of a limitation of time of that sort, yet it certainly has some idea of the thing not being done instantly. It is the case of *Colledge* v. *Horn* (1): "I have received yours respecting Mr. Colledge's demand; it is not a just one; I am ready to settle the account whenever Mr. C. thinks proper to meet me." That is with regard to the amount as in this case. "I am not in his debt 90*l.*, nor anything like that sum; shall be happy to settle the difference by his meeting me." Held that the judge was justified in directing the jury that after this letter the Statute of Limitations was out of the question. I think, therefore, without expressing an opinion more confidently than my learned Brothers have done, that the fair reading of this letter is that it does not impose a condition, that it points to a time which is sure to elapse, and that the promise is as unconditional in that way as possible.

(1) 3 Bing. 119.

LORD COLERIDGE, C.J. I am of opinion that the judgment ought to be affirmed. This case is an instance of the truth of what Alderson, B., said in *Hart* v. *Prendergast* (1), that different minds come to different conclusions of fact on the same document; for there was a difference of opinion in the Court below, and there is a difference of opinion here. Although with all sincerity I feel it is most likely I have come to the wrong conclusion, nevertheless, having come to it, and having come to it clearly, it is my duty to state it, and to state how I have arrived at it. This is an action brought on a promissory note dated as far back as 1858; the document which is in discussion is dated as far back as 1867, and the action was brought in 1873. The question throughout has been simply upon the interpretation of a few words in this document, because upon the principles that are to be applied to the construction of this document, I apprehend there ought to be, and I believe there is, no difference of opinion at all; indeed it has been settled not merely by the case of *Tanner* v. *Smart* (2), and by other cases to which we should be bound to pay great deference, but which are not binding authorities; but it has also been settled by a Court which does bind us, by the Court of Exchequer Chamber, in the case of *Smith* v. *Thorne*. (3)

What, then, are those principles? because it is extremely important, in my view, to ascertain exactly what it is we have to decide; and having ascertained what it is we have to decide clearly and definitely, it appears to me that the conclusion inevitably follows. The case, as I apprehend, stands thus. I use the form of the pleadings for the purpose of testing, and I know no better way of testing what a person who relies upon a document has to prove, and how far upon him lies the onus of proof. The declaration is upon a promissory note, and in answer the Statute of Limitations is pleaded. The Statute of Limitations is undoubtedly primâ facie an answer, because the promissory note is admittedly much more than six years old, and but for something to get rid of the statute, the statute would be a complete answer. How, then, is the statute to be got rid of? By producing, on the part of the plaintiffs, some document which satisfies the words of the later statute, and upon

(1) 14 M. & W. at p. 746.
(2) 6 B. & C. 603.
(3) 18 Q. B. 134; 21 L. J. (Q. B.) 199.

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which itself, in the terms used by the Courts, a fresh promise to pay can be founded and an action can be maintained. It has been held, and held, I think, with perfect accuracy, that it is only secundum quid that it can be said that the old debt is revived; it is only revived to the extent of forming a consideration for the new promise, on which the action, after all, is to be maintained. Now what is it the plaintiffs have to prove? The onus is on the plaintiffs, and they have to shew that an answer on the face of the plea absolutely good is not good, and they have to affirm something or other to take the case out of the operation of an apparently conclusive answer. I find that what they have to prove is stated in a good many cases, but substantially it comes to exactly the same thing. In *Tanner* v. *Smart* (1) the statement is "that under the ordinary issue on the Statute of Limitations an acknowledgment is only evidence of a promise to pay; and unless it is confirmable to and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid and is still subsisting, it has no effect. . . . The promises in the declaration which are to be supported are absolute and unconditional promises to pay when thereunto afterwards requested." That was a case in the Queen's Bench, but it is adopted as authority by the Court of Exchequer Chamber, which binds us, in the case of *Smith* v. *Thorne*. (2) Lord Wensleydale, in stating the law in *Smith* v. *Thorne* (3), says: "There has been no question, since *Tanner* v. *Smart* (4), that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By statute 9 Geo. 4, c. 14, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by shewing on the face of it an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event by which the promise is qualified." Then Sir Hugh Hill, a great and distinguished judge, in the case of *Everett* v. *Robertson* (5), expresses himself thus: "It has always

(1) 6 B. & C. at p. 609.

(2) 18 Q. B. 134; 21 L. J. (Q.B.) 199.

(3) 18 Q. B. at p. 143.

(4) 6 B. & C. 603.

(5) 1 E. & E. at p. 19; 28 L. J. (Q.B.) at p. 24.

been held, since *Tanner* v. *Smart* (1), that there must be either an unconditional acknowledgment from which a promise can be inferred, or a promise. But if the promise be conditional and the condition be unperformed, that is not an absolute promise until the condition be performed. In *Smith* v. *Thorne* (2), Parke, B., said: 'The acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled.'" And I find in *Hart* v. *Prendergast* (3) the same learned judge, Baron Parke, lays it down again that the evidence must prove a promise to pay on request. Then he draws the distinction which (if I may venture to say so) I will not say has been forgotten, but which has been perhaps a little obscured in this case. He points out that there are two alternatives necessary to this proof. First, an unconditional acknowledgment of the debt, and that alone will do, because if there is an unconditional acknowledgment of an existing debt you would infer an intention to pay that debt on request. But if the debtor annexes any qualification or condition, that is not sufficient without proof of the performance of it. Therefore, in one of the strongest cases cited by one of my learned Brothers, it was held that a letter, in which there was absolutely no promise to pay either present or future, was enough to take the case out of the statute, because the letter was an absolute and unconditional acknowledgment of the debt as existing, and the law annexed to that unconditional acknowledgment of the debt a present promise to pay on request. There are many cases in which there has been no promise of any kind, no express promise in terms, and yet the acknowledgment has been held sufficient to bar the operation of the Statute of Limitations for the reasons already given. Then the unconditional acknowledgment of the existence of the debt being arrived at, and that being sufficient if it is not qualified, there arises the second question,—upon which so much conflict of opinion has taken place upon particular phrases in this and other Courts,—when annexed to an unconditional acknowledgment of a debt there is a promise, whether that promise to pay is unconditional or not; and that is

(1) 6 B. & C. 603. (2) 18 Q. B. at p. 139.
(3) 14 M. & W. at p. 743.

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a question which must be kept wholly distinct. It is not only distinct in idea, but it is constantly distinguished from the former one, because a man may often and often acknowledge a debt, but be perfectly aware of the defence which the statute gives him, and although he acknowledge the debt in the most unmistakable manner, may yet go on to say, "I do not mean to pay it." Therefore the two matters must always, where there is anything besides the mere acknowledgment of the debt, be carefully kept distinct.

Now the question upon which my opinion differs, I am sorry to say, from that of my learned Brothers, is that second question. I do not doubt that if these words to which I shall in a moment call attention had not existed in the letter, this would have been an abundantly sufficient acknowledgment of an existing debt, within the cases, to take the case out of the Statute of Limitations. But where coupled with the acknowledgment there is a promise to pay of some kind or another, then, as Wigram, V.C., pointed out in the case of *Philips* v. *Philips* (1), the creditor must take the whole promise together, and inasmuch as the action is founded on the new promise, which only revives the old debt for the purpose of a subsisting consideration for the new promise, the creditor can get nothing more than the debtor gives him, and if the debtor gives him only a conditional promise, he cannot bring an action on the new promise as if it were unconditional. To confound the acknowledgment of the debt with a conditional promise to pay is to confound two things which are inherently distinct. That is, as I apprehend, perfectly clear. It is admirably put by Wigram, V.C., and I do not presume to say that upon my own authority, but upon the authority of Williams, J. in *Buckmaster* v. *Russell* (2), where he adopted the passage which I read during the argument from *Philips* v. *Philips* (3), as giving the true ratio decidendi. I apprehend, therefore, what we have to ascertain is, whether the document contains, first, an undoubted unqualified acknowledgment of the debt; next, whether, in the words of the above cases, there is any qualification or condition annexed to it, because it is not a sufficient acknowledgment, if there be such a condition, without there be added to it proof of the per

(1) 3 Hare, at pp. 299–100. (2) 10 C. B. (N.S.), at pp. 749–750.
(3) 3 Hare, at pp. 299–100.

formance of that condition or of the lapsing of the mentioned time. The words in the present case are, "The old account between us, which has been standing for so long, has not escaped our memory" (and I leave out purposely the words upon which discussion arises for the present), "and we will see you are paid." I do not hesitate for a moment to say that that is to my mind a perfectly clear admission of an existing debt. Therefore, if that was all that the letter contained, I should be of a different opinion to that at which I have arrived. But the words are, "and as soon as we can get our affairs arranged we will see you are paid. Perhaps, in the meantime, you will let your clerk send me an account of how it stands." "As soon as we can get our affairs arranged, we will see you are paid." Now suppose it to have been—which is not inserting any word, and which is really a mode of stating the case, perhaps a little more favourably for my own view, but still perfectly fairly—suppose the two clauses of that sentence had been transposed, and it had been, "and we will see you are paid as soon as we can get our affairs arranged." It cannot be said that that alters the sense in the slightest degree. The words remain the same; their collocation is only altered for the purpose of more clearly expressing to the minds of others what is in my own mind. "And we will see you are paid as soon as we can get our affairs arranged." Now it is for the plaintiffs, in my judgment, to shew that this is an unconditional promise to pay, not merely an unqualified admission of the debt, but an unconditional promise to pay on request. But is "we will see you paid as soon as we can get our affairs arranged" an unconditional promise to pay on request? Suppose the request had been made before the affairs were arranged. The answer would have been, "We never promised to pay you, our affairs are not arranged, and we said we would not pay you until they were; you cannot bring an action against us until our affairs are arranged, and they are not; you have no right to rely upon this as an unconditional promise to pay on request, because we told you fairly that your request could go for nothing until our affairs were arranged." This letter is written in 1867. The action is brought in 1873. The affairs have been six years at any rate, or nearly six years, being arranged. Whether that was a reasonable time is not for me to say, because it was

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a question probably for the jury and not for the Court. It is a promise made in 1867, unfulfilled in 1873, to pay "as soon as our affairs are arranged," affairs meaning, in my judgment, money affairs; and meaning that there were matters between them which rendered it impossible at the date of the writing to pay, and the phrase meant to annex some condition or other. If I understand the judgments of my learned Brothers, they must strike out those words, or they must say that those words annex no condition, that it is an unqualified promise: because the law has said that the promise must be either to pay on request, or it must be a promise to pay after the lapsing of a definite time which has elapsed, or upon the performance of some condition which can be averred and proved. Now apply that principle to this case, what time is fixed? What definite time is fixed the lapsing of which could have been stated, the performance of what condition precedent which could be averred on the record as having been performed? At all events, if either of these matters could have been averred they ought to have been averred in order to be proved. I mean this without reference to pleadings; but in the language of the judges it ought to have been proved that the condition which was annexed to the promise had been fulfilled at the time of action brought, and upon which the promise, which was conditional, had become an absolute promise. To my mind, assuming the law to be correctly laid down in the cases to which I have referred, I cannot help saying the conclusion from these words appears inevitable; that it is not inevitable is obvious, because a considerable majority of cultivated minds have come to a directly opposite conclusion; still the parties are entitled to such a judgment as my faculties enable me to form, and that is the judgment I have formed; and, in my opinion, the judgment of the Queen's Bench ought to be affirmed: but as the majority of the Court are of a different opinion, the judgment will be reversed.

Judgment reversed. (1)

Attorney for plaintiffs: *J. E. Wilson, for W. H. Rowland, Croydon.*

Attorneys for defendant: *Marriott & Jordan.*

(1) Notice of appeal was given to the House of Lords; but the case has since been settled.

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Bill of Exchange—Liability of Drawer or Indorser on Bill drawn or indorsed in one Country and payable in another—Enlargement of Time for Payment by ex post facto law.

The contract, which a party transferring for value the property in a bill of exchange makes with the transferee, is that he warrants that the bill, having been accepted by the drawee, shall, on being presented at the time it becomes due, be paid; that is, he engages as surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. The liability of the transferor, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be the obligations of the surety.

A bill of exchange was drawn and indorsed by the defendants in England upon French subjects resident in Paris, and was accepted by them in Paris. The bill on the face of it was payable on the 5th of October, 1870; before that date the Emperor of the French, in consequence of the war with Germany, enlarged the time for the payment and protesting of current bills of exchange for one month; and the time was afterwards enlarged from time to time by the government of France for the time being. By these enlargements of time the defendants' bill did not become payable till the 5th of September, 1871. On that day the bill was presented to the acceptors and payment refused; and it was duly protested, and due notice of dishonour, &c., given to all the parties:—

Held, that the defendants were liable on the bill at the suit of their indorsee for value.

CASE stated without pleadings, of which the following are the material parts:—

The action is brought by the plaintiff as indorsee against the defendants, the drawers and indorsers of a bill of exchange, dated the 28th of June, 1870.

Plaintiff, at the time of the drawing of the bill was, and still is, an English subject carrying on business in London; and defendants are merchants carrying on business in Manchester.

Defendants had been in the habit of employing plaintiff to negotiate in London their drafts on Paris, on the terms that plaintiff should indorse and sell the bills, and remit to defendants the proceeds, less his commission of 1*s.* 4*d.* per cent. and brokerage of 1 per mille. There being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money at an exchange to be fixed by plaintiff's indorsement on the bills, and the bills were made payable to defendants' order and specially in-

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dorsed to plaintiff, who having indorsed and fixed the rate of exchange, sold them, remitting to defendants the proceeds less his commission and brokerage.

On the 28th of June, 1870, defendants drew the following bill in three sets:—

"Manchester, 28 June, 1870, for 345*l.* 15*s.* 2*d.* sterling. On 5th October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves, the sum of 345*l.* 15*s.* 2*d.* sterling, at the exchange, as per indorsement, for value received, which place to account as advised.

"Overmann & Schou.

"To Messrs. Magalhaes Frères, Rue Martel, 5, Paris."

Defendants as usual indorsed the bill specially to plaintiff and forwarded it to him; and he specially indorsed the bill: "Pay Messrs. Krauetler & Mieville or order, at the exchange of 25 francs 38¾ centimes p. £ sterling value of the same, London, 5 July, 1870;" and sold it on that day in London to Messrs. Krauetler & Mieville (they being English subjects resident in England) for 345*l.* 15*s.* 2*d.*; and remitted to defendants that sum minus commission and brokerage.

Messrs. Magalhaes were, at the time of the drawing of the bill, and up to the 5th of September, 1871, French subjects resident in Paris, where they carried on business. They also carried on business in Pernambuco, and the goods for which the bill was drawn were sent to them there by defendants; but of this neither the plaintiff nor any of the indorsees of the bill had notice until after the 5th of September, 1871.

Krauetler & Mieville indorsed the bill in London: "Pay to the order of Messrs. Pillet, Will, & Co., value in account, London, 5th July, 1870;" and sent it to the indorsees who were French subjects resident in Paris.

The first of the bills was duly accepted at Paris:

"Accepté. Paris, 2 Juillet 1870. Magalhaes Frères."

The second of exchange had on the face of it: "First for acceptance with M. W. Bechtel, Rue Richer, 10, where in case of need" (this being defendants' need).

"In need with Messrs. W. Zellweger & Co., 29, Rue de Provence" (this being plaintiff's need).

During the currency of the bill, viz. on the 23rd of July, 1870, war was declared by France against Prussia, and about the 14th of September, Paris was invested by the forces of Prussia and her allies, and continued so invested until its capture on the 20th of January, 1871, when a convention for an armistice was signed at Versailles.

On the 13th of August, 1870, the Emperor Napoleon, then sovereign of France, made a law, of which the following is material:—

"Art. 1. Les délais dans lesquels doivent être faits les protêts et tous actes conservant les recours pour toute valeur négociable souscrite avant la promulgation de la présente loi sont prorogés d'un mois. Le remboursement ne pourra être demandé aux endosseurs et aux autres obligés pendant le même délai.

"Les intérêts seront dus depuis l'échéance jusqu'au payement."

On the 10th of September, 1870, the Government of the National Defence, the then sovereign power of France, made a law and decree, of which the following is material:—

"No. 36. Décret qui proroge les délais accordés par la loi du 13 Août 1870, relative aux effets de commerce.

"Art. 1er. La prorogation de délais accordée par la loi du 13 Août dernier relative aux effets de commerce est augmentée de trente jours à compter du 14 Septembre courant.

2. Toutes les autres dispositions de la loi du 13 Août sont maintenues."

On the 14th of October, 1870, and in each ensuing month down to the 13th of February, 1871, similar decrees, mutatis mutandis, were passed, by which the delay was extended to the 13th of March, 1871.

On the 19th of February, 1871, war between France and Prussia was ended.

On the 10th March, 1871, the National Assembly, the then sovereign power of France, passed, and the chief of the executive of the French Republic promulgated, a law, of which the following is material:—

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"Art. 2. Tous les effets de commerce échus du 13 Août au 12 Novembre 1870, seront exigibles sept mois date pour date après l'échéance inscrite aux lettres avec les intérêts depuis le jour de cette échéance. . . . .

"Art. 3. Par dérogation à l'article 162 du code de commerce (1) le délai accordé au porteur pour faire constaté par un protêt le refus de payement sera de dix jours. Les délais de dénonciation et de poursuites fixés par la loi courrent du jour du protêt."

On or about the 28th of March, 1871, a revolution broke out in Paris, and commercial business was suspended. This revolution came to an end about the 21st of May, 1871.

On the 21st of April, 1871, the National Assembly, the then sovereign power of France, made, and the president of the council promulgated, a law, of which the following is material:—

"No. 375. Loi relative aux prorogations des échéances des effets de commerce du 26 Avril 1871.

"Art. 1. Les effets de commerce, quelle que soit la date de leur souscription, payables dans le département de la Seine échus ou à échoir à partir du 18 Mars dernier jusqu'au dixième jour qui suivra le rétablissement du service de la poste entre Paris et les autres parties de la France ne seront exigibles qu'après ce terme.

"2. Une déclaration du Gouvernement contratera la reprise de ce service et le délai de dix jours courra de l'insertion de cette déclaration au journal officiel.

"3. Le délai facultatif de dix jours accordé au porteur par l'article 3 de la loi du 10 Mars pour les effets prorogés s'appliquera à tous les effets de commerce qui font l'objet de la présente loi."

On the 1st of July, 1871, postal service between Paris and other parts of France was re-established, and a declaration of the government of the resumption of that service was inserted in the official journal of that date.

On the 4th of July, 1871, a further law was made, and promulgated on the 7th, of which the following is material:—

(1) Article 162 of the Code de Commerce: "Lettre de change. Le refus de paiement doit être constaté le lendemain du jour de l'échéance par une acte que l'on nomme protêt faute de paiement."

"Art. 1. Le délai de sept mois accordé par l'article 2 de la loi du 10 Mars 1871, pour protester les effets de commerce échus du 13 Août au 12 Novembre 1870, est prolongé de quatre mois. Les dits effets devenant ainsi exigibles date pour date du 13 Juillet au 12 Octobre 1871 . . . Les dispositions qui précèdent ne s'appliquent qu'aux effets payables dans le département de la Seine ou dans les communes de Sèvres, Meudon et Saint-Cloud (Seine et Oise), et créés antérieurement au 31 Mai dernier. . . .

Art. 2. Dans les vingt jours qui suivront la promulgation de la présente loi les porteurs d'effets desquels l'échéance primitive serait antérieure à cette promulgation devront avertir leurs débiteurs des engagements qu'ils sont à remplir. . . . L'avertissement donné par le créancier et la réponse du débiteur seront constatés par le visa du débiteur lors de la présentation, ou, en cas d'absence ou de refus, par huissier sans droit d'enregistrement aux frais du débiteur."

Within the twenty days following the promulgation of this law, viz. on the 19th of July, 1871, Pillet, Will, & Co., who were the then holders of the bill, and had been so since the 5th of July, 1870, gave notice to Magalhaes Frères, in Paris, of their obligations on the bill, and they then wrote on the bill which was then presented to them,—

"Vu pour prorogation. Paris, 19 Juillet 1871.

"Magalhaes Frères."

The bill was presented for payment at Paris by Pillet, Will, & Co. on the 5th of September, 1871, to the acceptors, who refused payment; and afterwards, on the same day, the holders presented it for payment to William Bechtel (to whom reference was by defendants on the second of exchange in case of need), who also refused payment; and also to W. Zellweger & Co., who likewise declined to take up the bill without special instructions from plaintiff.

The bill was duly protested for non-payment on the 6th of September, 1871, by the holders. Notice of dishonour and of the protest in manner required by the law of France was given by the holders to Krauetler & Mieville on the 8th of September, 1871, and was received by them on the 9th of September, and on the same day they gave the like notice to the plaintiff, and he on the

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same day gave the like notice to defendants, who refused to pay the bill.

The plaintiff paid, before action, to Krauetler & Mieville 363*l.* 18*s.* 8*d.*, and this, together with 1*l.* 0*s.* 3*d.* for postages and for interest until the date of the suit, together with further interest at 5 per cent. on 345*l.* 12*s.* 2*d.*, from the 9th of September, 1871 (the date of the suit) until judgment, is the sum which the plaintiff is entitled to, if he can recover in the action.

Defendants had no notice that the bill had not been presented for payment prior to the 6th of September, 1871, nor of any of the laws or proclamations of the French Government.

The holders of the bill did not apply to Mr. W. Bechtel, who had an office in Paris, until the 5th of September, 1871.

Rue de Provence and Rue Richer are in Paris, and Paris is in the department of the Seine.

The Court was to have power to draw inferences of fact and to refer to the French Code de Commerce.

The question for the Court was whether the plaintiff is entitled, under the above circumstances, to recover against the defendants.

April 30; May 4. *Benjamin, Q.C.* (with him *Trevelyan*), for the plaintiff.

Herschell, Q.C. (with him *Ravenhill*), for the defendants.

The arguments are fully given in the judgment of the Court.

In addition to the authorities noticed in the judgment, the following were cited:—For the plaintiff: *Patience* v. *Townley* (1); *Rowe* v. *Young* (2); Code de Commerce, articles 161, 162; Codes Annotés, par Sirey, n. 30 and n. 31 to article 162 of the Code de Commerce; and n. 3 and n. 4 to the same article, in the supplement of the same work; Story's Conflict of Laws, § 347; *Allatini* v. *Abbott.* (3) For the defendants: Code de Commerce, art. 163; Nouguier, Lettres de Change, par. 999; *Gilbert* v. *Brett*, Le case de mixt moneys (4); articles 85 and 86 of German Code, 2 Leoni Levi, Commercial Law, p. 73.

Cur. adv. vult.

(1) 2 Smith, 223; 1 Chitty on Bills of Exchange, 714.

(2) 2 Bli. at p. 467, per Bayley, J.

(3) 26 L. T. (N.S.) 746.

(4) Davys, 18; 2 Bli. at p. 98, n.

July 5. The judgment of the Court (Cockburn, C.J., and Lush and Quain, JJ.) was delivered by

COCKBURN, C.J. This case was heard before my Brothers Lush and Quain, and myself. It was an action brought by the plaintiff, as indorsee and holder, against the defendants as drawers and indorsers, of a bill of exchange.

The defendants are merchants at Manchester. They had business transactions with the house of Magalhaes Frères, of Paris, and having shipped goods on account of the latter to Pernambuco, drew on them the bill of exchange in question, which was as follows:—

"Manchester, 28th June, 1870. For 345*l.* 15*s.* 2*d.* sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of 345*l.* 15*s.* 2*d.* sterling, at the exchange as per indorsement, for value received, which place to account as advised.

"Overmann & Schou.

"To Messrs. Magalhaes Frères, 5, Rue Martel, Paris."

The defendants were in the habit of sending bills so drawn on Paris to the plaintiff, who carried on business in London, for the purpose of his disposing of them, and remitting to them the proceeds; and there being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money, at an exchange of so many francs per pound, to be fixed by the plaintiff's indorsement on the bill.

The bill in question being, as we have seen, to the order of the drawers, was by them indorsed specially to the plaintiff, and transmitted to him for sale. The plaintiff having indorsed the bill, and by his indorsement on it fixed the rate of exchange at 25 francs 38¾ cents. for the pound sterling, sold the bill to Messrs. Krauetler & Mieville, of London, and duly remitted the proceeds to the defendants, minus the commission received by him on such transactions by agreement between him and them. Krauetler & Mieville indorsed the bill to Pillet, Will, & Co., of Paris, and transmitted it to them. The bill was duly accepted in Paris by Magalhaes Frères, the drawees.

The bill, according to its tenor, was payable on the 5th of Octo-

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ber, 1870. Pending its currency, the German army having invaded France, the Emperor Napoleon, on the 13th of August, by virtue of his legislative power, issued an edict in these terms: "The time within which protest and all other acts required to preserve the right of action on negotiable instruments signed before the promulgation of the present law must be effected, is prolonged for a month. Payment cannot be demanded of the indorsers or other persons bound thereby within that time."

The Emperor Napoleon having ceased to reign, on the 10th of September, the Government of the National Defence, the then sovereign power of France, passed and promulgated a law prolonging the delay thus afforded by the law of the 13th of August for the further period of a month from the ensuing 14th of September.

Similar enactments were passed from month to month by the legislative power, and duly promulgated by the head of the executive government, by which the operation of the law of the 13th of August was extended to the 13th of March, 1871. On the 19th of February the war between France and Germany came to an end. On the 10th of March the National Assembly passed, and the head of the executive government duly promulgated, a law, by the 2nd article of which it was, among other things, enacted that bills, &c., which had become due between the 13th of August and the 12th of November, 1870, should be payable at the expiration of seven months from the time at which they respectively fell due according to their tenor. By the 3rd article, instead of the one day allowed by the 162nd article of the Code de Commerce for effecting protest on non-payment, ten days were to be allowed for that purpose. By the effect of this law the bill in question, having fallen due on the 5th of October, would have been payable on the 5th of May. But fresh occurrences took place which led to a still further postponement.

At the end of March a revolution broke out at Paris, which led to the suspension of commercial business. On the 26th of April a law was passed by the National Assembly, the then sovereign power of France, and was duly promulgated by the president of the council, by which it was enacted that commercial bills, whatever might be the date of their signature, payable in the department of the Seine, which had already fallen due, or which would

fall due between the 18th of the previous month of March and a period of ten days after the re-establishment of the postal service between Paris and other parts of France, should not be liable to payment till after that term. The resumption of such service was to be notified by the government in the *Journal Officiel*, and the ten days were to run from the publication of such notice. The benefits of the delay in making the necessary protest in case of non-payment, granted by the 3rd article of the law of the 10th of March, was made applicable to all commercial bills falling within the law.

On the 1st of July the government declared the postal service between Paris and the rest of France re-established; and the present bill would consequently have been payable on the 11th; but on the 4th of July, a further law, promulgated on the 7th, was passed, whereby the delay granted by the law of the 10th of March for protesting bills of exchange which had fallen due between the 13th of August and the 12th of November was extended for another four months, making thus eleven months in the whole; and payment therefore could only be demanded, date for date, between the 13th of July and the 12th of October, ensuing. By a further article the holders of bills of exchange, &c., which, in the regular course, would have fallen due prior to the passing of the law, were to notify within twenty days to the parties liable thereon the obligations they would have to fulfil in respect thereof. The debtor was to be entitled to avail himself of the delays in respect of protests granted by the present law. The notice to the party liable and the answer of the latter were to be noted on the bill.

On the 19th of July, Pillet, Will, & Co., the holders of the bill, gave the notice required by this law to Magalhaes Frères, the acceptors, who thereupon wrote on it, "Vu pour prorogation—Paris, 19 Juillet, 1871. Magalhaes Frères." On the 5th of September, the day on which the extended term of grace expired in respect of this bill, Pillet, Will, & Co. presented the bill for payment, which was refused. They then presented it on the same day to Mr. Wm. Bechtel, of Paris, to whom reference in case of need had been made by the drawers on the second of exchange, but he also refused payment. The bill was duly protested, according to

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the French law, on the ensuing day, the 6th of September. Notice of dishonour and of the protest of the bill in manner required by the law of France was sent by Pillet, Will, & Co. to Krauetler & Mieville on the 8th of September, and was received by the latter on the 9th. The like notice was on the same day given by Krauetler & Mieville to the plaintiff, and by him to the defendants. The defendants refused payment of the bill.

Having paid to Krauetler & Mieville the sum of 368*l.* 18*s.* 8*d.*, the amount due on the bill for principal and interest, the plaintiff brings this action to recover that amount, together with a further sum for interest and postages.

The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonour on its non-payment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonour on non-payment at the regular time,—it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonour—the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonour will thereupon be given. How then, it was asked, can the right to insist on

these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favour of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion. (1) Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees inter se. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French Court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English Court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance—a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by

(1) Counsel on the argument read reports of these decisions from newspapers. See also a judgment of Sir P. Francis, judge of the Consular Court at Constantinople, in accordance with the latter view, in *Allatini* v. *Abbott* (26 Law Times (N.S.) 746.)

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the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or vice versâ, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by ex post facto legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the lex loci of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonour should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words,

he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees inter se shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by ex post facto legislation in the foreign country. A strong argument ab inconvenienti may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by

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the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after,—as was done by the Act of 34 & 35 Vict. c. 17,—the period at which the liability of the indorser on non-payment by the acceptor would arise, would be pro tanto delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonour in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract,

and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, à fortiori, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonour cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonoured, or that notice of its dishonour could be effectually given so as to charge the indorser.

Another ground for holding that presentment and notice of dishonour at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at

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the appointed time and notice of dishonour immediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced.

It was contended on behalf of the defendants in the present case, that the question before us was concluded by the authority of the decisions of the Judicial Committee of the Privy Council in *Allen* v. *Kemble* (1), and of the Court of Exchequer in *Gibbs* v. *Fremont.* (2) In delivering the judgment of the Committee of the Privy Council in the former case, Lord Kingsdown lays it down as law that, as between the holder and drawer, or indorser, of a bill of exchange, drawn in one country, but made payable in another, if the bill is not paid, the contract is to be governed in respect of damages and costs by the law of the country in which the bill is drawn and not by that of the country in which it is payable. "The drawer," says Lord Kingsdown, "by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place of domicile of the drawee if it be drawn and accepted generally, at the place appointed for payment if it be drawn and accepted payable at a different place from the place of the domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with interest, damages, and costs, as the law of the country where he contracted may allow." Whatever may be the respect to which an opinion of the Judicial Committee of the Privy Council may be entitled, the authority which would otherwise attach to the statement of the law contained in the foregoing judgment is materially diminished by the fact that it was unnecessary to the decision of the case then before the Court.

(1) 6 Moo. P. C. 314, 321, 322. (2) 9 Ex. 25; 22 L. J. (Ex.) 302.

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When the case of *Allen* v. *Kemble* (1) is more fully looked at, it will be seen that the question there turned, not on any disputed liability on a bill of exchange, but on a disputed right of set-off in a case of debtor and creditor. The facts were simply these: A., residing in Demerara, drew a bill on B., residing in Scotland, payable to C.'s order in London, and C. indorsed it to D., residing in Demerara, who indorsed it to E., resident in London. B. accepted the bill, making it payable at a banker's in London. When the bill arrived at maturity, B. was the holder of an overdue acceptance of E., the last indorsee and holder, who in the meantime had become bankrupt, and he claimed to set off the amount of this acceptance, as he was entitled to do, against his liability on his own acceptance. To avoid this right of set-off, the assignees of the bankrupt, instead of suing the acceptor, brought their action against the drawer and an indorser in Demerara. But they were foiled in an unexpected manner. By the Roman-Dutch law, the law of Demerara, a surety called upon to pay on default of his principal is entitled to the benefit of any cross claim which the principal may have against the creditor. Taking advantage of this, the defendants, not at all contesting, as indeed they could not for a moment contest, their liability on the bill, claimed, being sued in Demerara, the benefit of the local law, and insisted on their right to set off the amount of the bankrupt's unpaid acceptance in the hands of their principal, the acceptor of the bill on which they were sued, against their liability on the bill, a right which they would not have had by the law of England. The colonial Court disallowed the claim, but its decision was afterwards reversed by the Judicial Committee of the Privy Council, in our opinion most properly, so far as the result is concerned. But the decision had, obviously, nothing to do with the law relating to bills of exchange. It was simply, as we have said, a question as to the applicability of the law of Demerara, as to set-off, to a case of principal and surety on a debt of the principal arising in a country where a different law prevailed. Nothing turned on the law as to bills of exchange. The question would have been precisely the same if the action against the parties in Demerara had been

(1) 6 Moo. P. C. 314.

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brought on a guarantee given by them in respect of goods supplied to a party in this country.

The case of *Gibbs* v. *Fremont* (1), in which the Court of Exchequer adopted and acted upon the law laid down by Lord Kingsdown in *Allen* v. *Kemble* (2), is more to the present purpose, as the decision there turned on the law applicable to bills of exchange. A bill having been drawn in California on a party resident at Washington, without interest being reserved on the face of it, in an action against the drawer by a holder in this country, acceptance having been refused, it was held that the holder was entitled to interest according to the rate current at California.

Without expressing any opinion as to the soundness of this view, it is sufficient to observe that the question in the present case turns, not upon what may be the rights and liabilities of indorser and indorsee in regard to damages on non-payment of the bill, but on the time of presentment for payment and notice of dishonour. Now, as has already been observed, it is well settled that the time when a bill becomes due depends on the lex loci solutionis, and it is equally certain that presentment for payment before a bill is due in point of law is inoperative to affect an antecedent party. It was so ruled by Lord Kenyon in *Wiffen* v. *Roberts* (3), and the law has never been questioned. It is equally clear that until presentment for payment has been effectually made, notice of dishonour cannot be effectually given.

The case of *Rothschild* v. *Currie* (4), in this Court, establishes the position that where a bill, payable in a foreign country, is drawn and indorsed in this country, the sufficiency of the notice of dishonour must depend on the law of the place of payment; and consequently that notice of dishonour, good by the law of France, in which country the bill in that case was payable, though beyond the time within which such notice must have been given according to English law, was sufficient to fix the indorser. The same point arose in *Hirschfeld* v. *Smith* (5), and was decided by the Court of Common Pleas on the authority of *Rothschild* v.

(1) 9 Ex. 25; 22 L. J. (Ex.) 302.
(2) 6 Moo. P. C. 314.
(3) 1 Esp. at p. 262.
(4) 1 Q. B. 43.
(5) Law Rep. 1 C. P. 340.

Currie (1); though also on the further ground that, assuming that the contract between indorser and indorsee, on a bill indorsed in England, is to be governed by the law of England, and, therefore, notice of dishonour, as required by the law of England, is necessary, yet that reasonable notice is all that is required; and though, as regards inland bills, what is reasonable time has become fixed by practice and legal decision, as regards bills payable in a foreign country, what is a reasonable time must depend on circumstances, and that the law of the country where the bill is payable affords a safe criterion, and notice given according to it may be taken to be reasonable notice. It cannot be disputed that notice of dishonour as given in this case, would have been good and sufficient according to the law of France. It follows, upon the authorities referred to, that it must be held to have been sufficient as between the holder and the antecedent parties to the bill in an action brought in this country.

Moreover, if it be once established that, on the dishonour of a bill of exchange payable in a foreign country, the notice to be given to the drawer or indorser should be, with reference to time and to the required formalities, in conformity with the law of the place of payment, a further ground presents itself for deciding against the defendants in the present case. By the law of France, before notice of dishonour can be given, a protest, accompanied by certain prescribed formalities, made through the intervention of a notary public, is indispensably necessary: see Art. 162 of the Code de Commerce. And by Article 165 of the same code, it is of this protest that the holder must give notice to the drawer or indorser whom he proposes to make liable. But, by the special law by which the bill now in question was affected, the protesting of all bills coming within its operation was expressly prohibited till the expiration of the additional time for payment allowed by way of indulgence to the acceptors. It is admitted that this bill was protested at the earliest time which the existing law admitted of, and that due diligence was used in giving notice to the defendants from the time of making the protest.

On these grounds we are of opinion that the presentment for payment was made, and the notice of dishonour given, at the

(1) 1 Q. B. 43.

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right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Druce, Sons, & Jackson.*
Attorney for defendants: *J. E. Fox.*

May 31.

JOHNSON, APPELLANT; COLAM, RESPONDENT.

Contagious Diseases (Animal) Act (32 & 33 *Vict.* c. 70) *ss.* 64, 109—*Jurisdiction of Justices—Place where the Offence was committed—Place where the Person happens to be.*

By 32 & 33 Vict. c. 70, s. 64, a railway company is to provide food and water for cattle carried by them on the request in writing of the consignor or any person in charge thereof, and "if in the case of any animal such request is not made, so that the animal remains without a supply of water for thirty consecutive hours, . . . the consignor and the person in charge of the animal shall each be deemed guilty of an offence against this Act. . . ." By s. 103 a penalty is imposed on any person guilty of an offence, but it is not said how the penalty is to be recovered. By s. 109, for the purposes of proceedings under this Act . . . every cause of complaint . . . shall be deemed to have arisen either in the place in which the same was actually committed or arose, or in any place in which the person charged or complained against happens to be.

The appellant was the consignor of cattle from K. to C. to be carried over a railway upon a journey which lasted more than thirty hours. He did not make any request that the cattle should be supplied with water. The justices of C. issued a summons against the appellant, then being in W., and, on his appearing to the summons, convicted him of an offence against s. 64:—

Held, first, on the authority of *Cullen* v. *Trimble* (Law Rep. 7 Q. B. 416), that the offence was within the summary jurisdiction of justices; secondly, that the conviction could not be sustained: for that the offence was completed before the cattle reached C., the thirty hours having then expired; and the appellant, by appearing before the justices in obedience to their summons, did not "happen to be" at C. and within their jurisdiction.

CASE stated by justices of Colchester under 20 & 21 Vict. c. 43.

An information was preferred by the respondent under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) (1), for that the appellant, on the 12th of February, 1875, being the

(1) By s. 64 of 32 & 33 Vict. c. 70, "Every railway company shall make a provision, to the satisfaction of the Privy Council, of water and food, or either of them, at such stations as the Privy Council from time to time by

consignor of forty-one animals, to wit, cattle about to be carried on the railways of the North Eastern Railway Company and the Great Eastern Railway Company from Kirkby Stephen, in the county of Westmoreland, to the borough of Colchester, did not make a request in writing to the North Eastern Railway Company to supply water to the animals during the time they were about to be carried, so that they remained without a supply of water for upwards of thirty consecutive hours.

At the hearing it was proved that the appellant is a cattle dealer, and that on the 12th of February, 1875, he booked forty-one head of cattle at Kirkby Stephen station, which is a station on the Darlington section of the North Eastern Railway Company to Peterborough, which was as far as the company had rates for. The cattle were consigned to G. Baines, Elmstead, Colchester. At the time they were consigned the defendant made no request to the servants of the North Eastern Railway Company either verbally or in writing to have the cattle fed or watered. No one travelled with the cattle. They were placed in two trucks and attached to a train which left Kirkby Stephen on the 12th of

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general or specific description direct, for animals carried, or about to be, or having been, carried on the railway of the company, and such water and food, or either of them, shall be supplied to any such animal by the company carrying it on the request in writing of the consignor thereof, or on the request of any person in charge thereof. . . . . If in the case of any animal such a request as aforesaid is not made, so that the animal remains without a supply of water for thirty consecutive hours, or other period not being less than twelve hours as the Privy Council from time to time by order prescribe, the consignor and the person in charge of the animal shall each be deemed guilty of an offence against this Act, and it shall lie on the person accused to prove the time within which the animal has had a supply of water." By s. 8, "animal" means (except where it is otherwise expressed) "cattle" . . . and the term "cattle," means bulls, cows, oxen, heifers, and calves. By s. 103: "If any person is guilty of an offence against this Act, he shall for every such offence (except as otherwise provided) be liable to a penalty not exceeding 20*l*. Where any offence is committed with respect to more than four animals, a penalty not exceeding 5*l*. for each animal may be imposed, instead of the penalty of 20*l*. By s. 109: For the purposes of proceedings under this Act . . . every offence against this Act . . . shall be deemed to have arisen either in the place in which the same actually was committed or arose, or in any place in which the person charged or complained against happens to be."

By an order of the Privy Council, dated the 31st of March, 1871, Kirkby Stephen, Darlington, York, Peterborough, and Stratford are watering stations.

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February, 1875, at 2.30 p.m.; they reached Darlington, which is thirty-eight miles distant from Kirkby Stephen, on the same day, at 4.45 p.m., and arrived at Peterborough on the morning of the 13th of February, at about 11.30. The distance from Darlington to Peterborough is 155 miles. An inspector of the Society for the Prevention of Cruelty to Animals had the cattle fed and watered at Peterborough, and the trucks containing the cattle were handed over by the North Eastern Railway Company to the Great Eastern Railway Company, and were sent by the first available train, at 12.30 p.m. to March, and from thence, via Stratford, to Colchester. The distance by rail from Peterborough to Colchester is ninety-six miles, via Cambridge, but more than that by Stratford. The cattle arrived at Colchester at 4 o'clock on the morning of the 14th of February, but it was 7 o'clock before the trucks came alongside the cattle siding. If the cattle had been sent via Cambridge, they would have arrived at Colchester at 10 o'clock on the night of the 13th of February.

It was objected, on behalf of the appellant: First, that no offence had been committed within the jurisdiction of the Colchester justices, as the offence arose at Kirkby Stephen, and not at Colchester, and that the words of s. 109, giving jurisdiction "where the party charged or complained against happened to be," referred to the place where he was at the time of commencing the proceedings by laying the information, and not to the place where he was at the time of hearing the information. (1) Secondly, that the appellant was not bound to request that water might be supplied, as the time which the cattle were on the North Eastern Railway was not likely to have been thirty hours.

The justices decided that they had jurisdiction under s. 109, first, because the appellant's act continued up to the delivery of the animals at Colchester, and, secondly, in consequence of the appellant being there present before them; and they convicted the appellant, and adjudged him to pay 1s. for each animal.

The question for the Court was, whether the justices had jurisdiction to hear the information.

Wightman Wood, for the appellant. First, the justices have no

(1) It was stated by counsel that the appellant was in Westmoreland when the summons was issued.

summary jurisdiction to convict under s. 64. By that section if a request to supply water and food is not made by the consignor of any animal, that is, cattle, so that the animal remains without water for thirty consecutive hours, the consignor is guilty of an offence against the Act. Sect. 103 imposes a penalty on persons guilty of offences under the Act; but the Act contains no clause which expressly gives justices summary jurisdiction. *Cullen* v. *Trimble* (1) was a decision on the special words of s. 57 of 32 & 33 Vict. c. 70. That section refers to the public exposure of diseased animals, and provides that the person charged is to shew "to the satisfaction of the justices, before whom he is charged, that he did not know" that the animals were affected. No words giving a jurisdiction to justices by implication are to be found in s. 64.

[FIELD, J., referred to s. 108, which provides that if any party feels aggrieved by the dismissal of his complaint by justices, or by any determination or adjudication of justices with respect to any penalty under this Act, he may appeal therefrom.

BLACKBURN, J. I think it is plain enough that the legislature meant that penalties under this Act should be recovered in a summary manner before justices, and as we held that justices have jurisdiction under s. 57, so we must hold that they have jurisdiction in the present case.]

Secondly, by s. 109 every offence under this Act shall be deemed to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the person charged or complained against happens to be. The justices had no jurisdiction under the first part of the section, for the offence was actually committed at Kirkby Stephen, and not at Colchester.

[BLACKBURN, J. The request need not be made when the cattle are delivered to the railway company to be carried; it may be made at any time during the transit of the cattle before the thirty hours expire.]

At any rate the offence was complete by the expiration of the thirty hours before the cattle reached the jurisdiction of the Colchester justices. The justices, however, convicted on the latter part of s. 109: "in any place in which the person charged or complained against happens to be."

(1) Law Rep. 7 Q. B. 416.

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[BLACKBURN, J. We understand from the case that when the summons issued the appellant was not at Colchester.]

At that time he was in Westmoreland, but appeared before the justices at Colchester in answer to the summons, but that does not give the justices jurisdiction.

The respondent did not appear.

BLACKBURN, J. We have disposed of the first point argued before us on the authority of *Cullen* v. *Trimble* (1), which we think shews that all offences against the Act are to be proceeded against summarily before justices.

As to the other point. It appears that the cattle were in point of fact kept without water for more than thirty hours, and during that time the offence was being committed, and I am of opinion that the information could be laid at any place through which the cattle passed during the transit, provided that at the time of their passing the thirty hours had not elapsed. When the thirty hours had elapsed, inasmuch as the consignor had not then made a request as provided by the statute to supply the animals with water, the offence was actually committed, and did not arise at any place where the cattle arrived after the thirty hours expired. I am further of opinion that the words, "happens to be," must mean in any place in which he is after the offence is complete. If the appellant had travelled with the cattle to Colchester, and whilst he was there had been summoned before the justices, they would have had jurisdiction, but they cannot, by issuing a summons at a time when he was not at Colchester, and compelling him to come before them, give themselves jurisdiction to convict him of the offence charged.

LUSH, J. It is clear that the justices for the borough of Colchester had no jurisdiction.

FIELD, J., concurred.

Judgment for the appellant.

Attorney for appellant: *E. Doyle, for Jones, Colchester.*

(1) Law Rep. 7 Q. B. 416.

MULLIGAN *v.* COLE AND OTHERS. 1875

June 16.

Libel—Nonsuit on Ground of Words not capable of a defamatory Sense.

Declaration for a libel published in a Walsall newspaper: "Walsall Science and Art Institute. The public are informed that Mr. M.'s" (the plaintiff's) "connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." Signed by the defendants as officers of the institute. Innuendo, that the plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the institute.

At the trial it appeared that the plaintiff was a certificated art master, and had been master at the institute. His engagement with the defendants ceased in June, 1874, and he got up and became master of another school, which was called "The Walsall Government School of Art," and was opened in August; in September the advertisement complained of appeared.

The learned judge directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo:—

Held, that the nonsuit was right: for that the advertisement was not capable of a defamatory meaning.

DECLARATION that defendants falsely and maliciously published of the plaintiff in a newspaper, called the *Walsall Observer*, the words following: "Walsall Science and Art Institute. The public are respectfully informed that Mr. Mulligan's" (meaning the plaintiff's) "connection with the institute has ceased and that he is not authorized to receive subscriptions on its behalf;" signed by the three defendants as chairman, treasurer, and secretary respectively; meaning thereby that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the said institute.

Pleas: First, not guilty; second, as to the publication of the words in the declaration (without the alleged meaning), that the words were and are true in substance.

Issue joined.

At the trial before Quain, J., at the Staffordshire spring assizes, it appeared that the plaintiff was a certificated art master; he had been appointed master to the Walsall school of art, which had been established at Walsall in connection with the Science and Art Department at South Kensington, and which was subsequently called the Walsall Science and Art Institute, and of this institute the defendants were chairman, treasurer, and secretary respectively.

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In June, 1874, the plaintiff's engagement with the defendants ceased by notice from them, in consequence of his not acceding to certain alterations in the terms of his engagement which the defendants had proposed. The plaintiff was afterwards instrumental in establishing a new school of art called the Walsall Government School of Art, and he had obtained subscribers and received subscriptions for it. The new school was opened on the 10th of August, 1874, and the advertisement, the subject-matter of the libel, was published in the *Walsall Observer* of the 19th and 26th of September. In addition to the above facts, the plaintiff stated that he had never solicited subscriptions for the Walsall Institute.

The learned judge directed a nonsuit, on the ground that there was no evidence to go to the jury that the advertisement bore the meaning imputed to it by the innuendo.

A rule for a new trial was obtained on the ground of misdirection by the judge in nonsuiting the plaintiff because there was no evidence of the innuendo.

J. J. Powell, Q.C., and *Bosanquet*, shewed cause. The words without the meaning attached by the innuendo are incapable of a defamatory meaning, and there is no evidence to shew they were used or intended to bear the meaning ascribed to them by the innuendo; and that being the case, it was the duty of the judge to withdraw the case from the jury: *Hunt* v. *Goodlake* (1), citing the judgment of Wilde, C.J., delivering the judgment of the Exchequer Chamber in *Sturt* v. *Blagg* (2): "Undoubtedly it is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by the innuendo."

[LUSH, J. Since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, if the words are capable of any defamatory meaning, the case must be left to the jury: see *Watkin* v. *Hall.* (3)]

Looked at in connection with the circumstances under which it was published, the advertisement can only mean that the public

(1) 43 L. J. (C.P.) 54, 56. (2) 10 Q. B. at p. 908.
(3) Law Rep. 3 Q. B. 396.

are informed that the connection of the plaintiff with the institute had ceased; and it was necessary to do this in order to prevent the mistakes which would otherwise arise from the similarity of the names of the two schools.

H. Matthews, Q.C., in support of the rule. The meaning imputed to the words by the innuendo is the natural one; but the words, at the very lowest, are capable of the defamatory meaning imputed to them; and "it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance:" per Kelly, C.B., in *Cox* v. *Lee*. (1) The nonsuit therefore, was wrong, and the rule ought to be made absolute.

MELLOR, J. I am of opinion that the nonsuit was right, and that there was no question which my Brother Quain could properly have left to the jury. The action is for a libel; the words complained of are: [the learned judge read the libel.] Reading the words in their ordinary sense, they amount to no more than information to the public that the plaintiff, Mr. Mulligan, who had been connected with the institute, no longer had any connection with it, and was therefore not authorized to receive subscriptions for it, and that subscriptions paid to him would not be for it. I cannot help thinking that to an ordinary person it would convey no more than the legitimate information, and that no such defamatory meaning as that imputed by the innuendo, nor any other defamatory meaning, was intended to be expressed. It appears also to me that the plaintiff failed in giving any other meaning to the advertisement than that which it naturally bears, which is perfectly innocent. It was published, doubtless, to prevent the confusion between the two schools, which it was naturally apprehended would arise from the similarity of names. I have, therefore, come to the conclusion that my Brother Quain adopted the only proper course; as there was nothing in the evidence or in the language of the advertisement to shew it was not perfectly bonâ fide; and there was therefore nothing which amounted to proof for

(1) Law Rep. 4 Ex. at p. 288.

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the jury that it bore a defamatory meaning. The rule must, therefore, be discharged.

LUSH, J. I have entertained considerable doubt during the discussion; but I have come to the conclusion that the words are not capable of the sense put upon them by the innuendo, nor of any other defamatory sense, so as to support the declaration for libel. On looking at the circumstances it seems clear that no reader of the newspaper could reasonably infer that the plaintiff had been going about collecting subscriptions, or had been guilty of receiving subscriptions for his own school which had been intended for the other; but the plaintiff, having been connected with the one, the defendants' institute, they published the advertisement to prevent the mistakes which might arise from his being connected with a similar institution. That seems to me to be the ordinary meaning of the advertisement, and the defendants were justified in publishing it. Just as, on a dissolution of partnership, a notice is given in the newspapers, that only one of the partners is authorized to receive debts due to the firm; and it could never be suggested that this was meant to imply that the other partners had been improperly collecting the debts. The case certainly comes very near the dividing line, so near as to have raised doubts in my mind. But on the whole, I have come to the conclusion that the case ought not to have been left to the jury.

QUAIN, J., concurred.

Rule discharged.

Attorneys for plaintiff: *Flux & Leadbitter, for Slater, Darlaston.*

Attorneys for defendants: *Pearce & Son, for Wilkinson & Gillespie, Walsall.*

[IN THE EXCHEQUER CHAMBER.]

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June 16.

KISH *v.* CORY AND OTHERS.

Shipping—Charterparty—Condition that Charterer's Liability shall cease—Lien on Cargo for Demurrage.

By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days demurrage to be allowed above the said days. Charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—

Held, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading.

Francesco v. *Massey* (Law Rep. 8 Ex. 101) affirmed.

Quære, whether the lien for "demurrage" would have extended to damages for detention beyond the demurrage days.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants on demurrer to pleas.

First count, that by charterparty made and entered into between the plaintiff and defendants it was amongst other things agreed as follows: that the vessel *Spring* should with all dispatch proceed to the usual safe loading berth at Hull, as ordered by shippers, and there take on board as tendered in the regular and customary manner a full and complete cargo of coal, which the merchants bound themselves to provide for shipment, not exceeding what she could reasonably stow and carry over and above her tackle, &c., cargo to be loaded in thirteen clear working days from the day written notice was given that all ballast or inward cargo was discharged and the stiffening coals (if any) were on board, and of the vessel being ready to receive the remainder of her cargo: that the vessel did proceed pursuant to the charter, as ordered by the shippers, to the usual safe loading berth at Hull, and that written notice was given to the defendants or their agents in that behalf, that the vessel was ready to receive her cargo pursuant to the charterparty: that all conditions precedent were performed, yet the defendants did not load the cargo within the thirteen clear working days from the day written notice was given and as agreed by the charterparty, but kept and detained the vessel after the thirteen clear working days, although the vessel during the

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thirteen days was always ready and able to load the agreed cargo, and kept and detained the vessel for the space of five days over and above the thirteen days, whereby the plaintiff lost the use of the vessel and the profits thereof and was put to expense in maintaining the vessel and the master and crew thereof, and in paying dock and other dues in respect of the vessel.

Second count, that it was agreed between the plaintiff and the defendants that the vessel, *Spring*, should be chartered to the defendants for a voyage from the usual loading berth at Hull to Alexandria, and that the defendants would load in a regular and customary manner a full and complete cargo of coals on board the vessel in thirteen clear working days from the day written notice was given to the defendants or their agents in that behalf, that the ship was ready to receive her cargo, and that, should default be made in loading the cargo in thirteen clear working days from the day aforesaid, the defendants would pay to the plaintiff at the rate of fourpence per register ton of the vessel per day; that the vessel was chartered as aforesaid: that all conditions precedent had been performed, yet default was made in loading the cargo in thirteen clear working days from the day aforesaid, and the ship was kept and detained for five days over and above the thirteen working days, and the defendants have not paid to the plaintiff at the rate of fourpence per register ton of the vessel per day.

Third count, for money payable for demurrage of the plaintiff's ship.

Fifth plea, to the first and second counts that the agreement in the second count is the charterparty mentioned in the first count, and that the charterparty is as follows: the plea then set out the charterparty, the material parts of which were: "That the vessel shall proceed to Hull and there take on board as tendered a full and complete cargo of coal which the merchants bind themselves to provide for shipment. . . . Cargo to be loaded in thirteen clear working days from the day written notice is given that all ballast or inward cargo is discharged, and being so loaded the vessel shall proceed to Alexandria and deliver the same . . . on being paid freight at the rate of 21*l.* per keel of twenty-one tons . . . freight to be paid, one third, if required, in cash on signing bills

of lading, less five per cent. for all charges, balance at port of discharge in cash at the current rate of exchange for ship's disbursement, and remainder by an approved bill upon London at three months date, or all cash equal thereto at captain's option on the right and true delivery of the whole cargo. Cargo to be discharged at not less than thirty-five tons per working day, time to commence on the ship being ready to deliver. Ten days demurrage for all like days above the said days to be paid at the rate of fourpence per register ton per day. . . . Bills of lading to be signed as presented without prejudice to this charterparty . . . . Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage." The plea then averred that the ship was loaded by the defendants with the agreed cargo within the ten days on demurrage stipulated in the charterparty, and that thereupon the defendants' liabilities as charterers upon and under the charterparty ceased.

Sixth plea was a similar plea to the third count for demurrage.

Demurrer to the fifth and sixth pleas and joinder in demurrer.

June 5, 1874. Judgment was given by the Court of Queen's Bench for the defendants on the authority of *Francesco* v. *Massey*.(1)

A. L. Smith, for the plaintiff. It must be admitted that *Francesco* v. *Massey* (1) is an authority against the plaintiff. The words in that case were similar to those in this case, "charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The Court held that the lien on the cargo for demurrage extended to demurrage at the port of loading as well as at the port of discharge, and that the charterer's liability was discharged. That case, however, is not a binding authority in a court of error. The parties to this charterparty never intended by such a clause to divest a vested cause of action; and the true construction of the clause is, that the charterer is to be liable for a breach of the charterparty prior and during the loading of the cargo; but after the cargo is on board, he is to be exempt from all future liability, and for any breach of the charterparty after the loading the shipowner must rely upon his lien.

(1) Law Rep. 8 Ex. 101.

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Pedersen v. *Lotinga* (1) and *Christoffersen* v. *Hansen* (2) are in favour of this construction. On the other hand, *Bannister* v. *Breslauer* (3) is a decision adverse to the plaintiff; but that case was not approved of in *Gray* v. *Carr*. (4) In *Lockhart* v. *Falk* (5) it was decided that a clause, by which the shipowner was to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he should have delivered the cargo alongside ship, applied only to demurrage at the port of discharge. The cases would seem to be conflicting; but, on the authority of the earlier cases, the plaintiff is entitled under this charterparty to maintain his action for demurrage incurred at the port of loading.

Wood Hill for the defendants. The clause in the charterparty discharges the charterer from all liability for breaches of the charterparty incurred both at the port of loading and the port of discharge, and the shipowner has a lien for demurrage incurred at the home port as well as at the foreign port. *Francesco* v. *Massey* (6) is precisely in point. Bramwell, B., says: "By the charterparty the charterer was entitled to a certain number of days on demurrage. This was applicable to the loading as well as to the unloading. Some of these days were consumed at the port of loading, and for a portion of them the defendant has paid. The present claim is for the residue of the days so consumed at the port of loading. The charter contained a clause that on loading the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred as well at the port of loading as at the port of discharge, and so for the demurrage sued for; and it seems impossible to hold that the matters as to which the liability was to cease were not the same as the matters as to which the lien was given. If so, the defendant is discharged, and this action is not maintainable." The whole of that reasoning is applicable to the present case. It is only reasonable that the merchant in England shipping a cargo for a foreign principal should be free from liability when he has

(1) 28 L. T. 267; 5 W. R. 290.
(2) Law Rep. 7 Q. B. 509.
(3) Law Rep. 2 C. P. 497.
(4) Law Rep. 6 Q. B. 522.
(5) Law Rep. 10 Ex. 132.
(6) Law Rep. 8 Ex. 101, 106.

performed his part of the contract and shipped the cargo, and after the cargo is shipped the shipowner should have his remedy against the foreign consignee, with a lien on the cargo.

[BRETT, J. If the vessel was detained beyond the days allowed for demurrage would the shipowner have any lien on the cargo for damages for detention?]

Most probably he would, but that question does not arise in the present case.

A. L. Smith, in reply.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the Court below should be affirmed.

We have to construe a charterparty, in which certain days are given for loading, certain days are given for unloading, "and ten days on demurrage for all like days above the said days to be paid at the rate of 4*d.* per register ton per day." The action is brought upon the charterparty for demurrage at the rate mentioned for certain days in excess of the working days which were fixed for the loading; and the question arises upon the words, "Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage."

Now, if this were res integra, and I had to construe this charterparty entirely free from authority, there would be very much to be said for a different construction to that at which I have arrived, and at which I believe every member of this Court has arrived. There would have been a good deal to be said for the argument that has been addressed to us, that the words "charterer's liability to cease when the ship is loaded, the captain and owner having a lien upon the cargo for freight and demurrage," meant to keep the liability of the charterer alive for breaches committed before the ship was loaded, and that these words only exempted the charterer from that liability which, but for this stipulation, would accrue against him for delay and demurrage at the port of discharge. This view does not now seem maintainable, as it is opposed to two propositions which have been already established by judicial decisions. It has been held that where the days for demurrage are mentioned in the charterparty after the loading days and after the discharging days, the general words ascertaining the

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demurrage days apply both to the loading days and discharging days. That has been held repeatedly, and may be considered determined. And it has likewise been held that where demurrage is mentioned, and it is stipulated that the liability of the charterer is to cease when the ship is loaded, in an action for demurrage, in the strict sense of the term, the charterer is protected against liability, as well at the port of loading as at the port of discharge.

Now, in mercantile contracts which are drawn with reference to decided cases, it is important stare decisis, and whatever might have been my impression apart from the cases cited before us, I am not prepared to overrule them, and therefore I accept *Francesco* v. *Massey* (1) as a binding authority. *Bannister* v. *Breslauer* (2), which was referred to in the argument, was an action on a charterparty, in which no days for demurrage were specified, but it contained a clause that the charterer's liability should cease upon shipping the cargo, provided the same should be worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for demurrage. A delay having occurred in loading, the shipowners sued the charterers. The Court of Common Pleas in effect held that, as the lien for demurrage could there apply only to detention, as distinguished from demurrage properly so called, the charterers were exempt from liability. The reasoning on which that case was decided has been questioned, and perhaps on strict examination does not appear perfectly accurate; but it seems to me that the decision itself was perfectly right, and, upon a charterparty containing a similar provision, I should be prepared to adhere to *Bannister* v. *Breslauer*. (2) Hereafter a question may arise as to the construction of a charterparty framed like the one before us, when the shipowner sues, not for demurrage properly so called, but for unliquidated damages for detention at the port of loading, and when the charterer relies upon the clause exempting him from liability. It will be necessary, then, to consider whether demurrage includes detention. I am inclined to think that, even in that case, it will be held that the charterer's liability ceases on loading, and the lien attaches. I think this was the opinion of my Brother Lush in *Christoffersen* v.

(1) Law Rep. 8 Ex. 101. (2) Law Rep. 2 C. P. 497.

Hansen. (4) There was a question as to detention, and Lush, J., says: "If there were any provision giving the shipowner an equivalent advantage, there would be a very good reason for his absolving the defendant [the charterer] altogether." Without offering any opinion as to this question, whenever it shall arise, I am of opinion that the judgment of the Court below must be affirmed.

BRETT, J. We are called upon to construe a clause which is now frequently inserted in charterparties; and as mercantile documents are drawn up with reference to judicial decisions, I am not prepared to overrule any of the cases cited before us, although I dissent from the principle on which they were founded.

Three interpretations of the clause may be suggested. By the first, liability of every kind, as well for past as for future breaches, is to cease so far as the charterer is concerned. By the second the charterer is exempted only from future liability, that is, after the loading of the ship; but in each case the shipowner can enforce his remedy against the consignee by his lien on the cargo. By the third the charterer's liability is to cease, but only a partial remedy is given to the shipowner by the lien against the consignee, that is, he can exercise his lien for demurrage, but not for detention. If this last were the legal interpretation of the clause, I should think it so unjust that I should be prepared to overrule former decisions upon which it is based, for I cannot think that it would express the real agreement of the parties; but I am inclined to think that the interpretation to be adopted at the present day is that the charterer's liability for past breaches is to cease upon loading the cargo, but the remedy of the shipowner is given against the consignee to the extent of his remedy against the charterer, that is to say, the lien is given in full for all breaches for which the shipowner would but for this clause have had a remedy against the charterer. I know that in this case it is unnecessary to say that the lien is given for more than demurrage properly so called at the port of loading, but I cannot be a party to construing such a clause as this, and holding that it absolutely absolves the charterer from all liability, past as well as future, without considering what must take place were we also to hold that the lien were

(4) Law Rep. 7 Q. B. 509, 516.

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1 Q B D 242.

given simply for demurrage properly so called. The consequence would be that if the ship were detained at the port of loading beyond the demurrage days, the liability of the charterer when the ship was loaded would cease; there could be no action against him for detention, and yet there would be no lien upon the cargo for anything but demurrage proper, and the shipowner would be obliged to deliver the cargo to the consignee on payment of the demurrage. He would have no action against the consignee for detention at the port of loading, and notwithstanding the fault of the charterer, he would have no remedy against anyone. The result would be so unjust that I cannot think that this construction was meant by the parties. It may be said that this difficulty may be obviated by holding that the liability of the shipowner was to cease only in respect of the delay of the vessel during the demurrage days, and that the lien would attach for that only, and that, notwithstanding the clause of exemption, a right of action would remain against the charterer for delaying the ship at the port of loading beyond the demurrage days. That construction seems hardly consistent with the decisions in which it has been held that the charterer's liability is to cease for past breaches of the charter-party, at all events in the detention of the ship.* I feel certain that when the occasion arises it will be held, upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that "demurrage" includes not only demurrage proper, but also that which is in the nature of demurrage, viz. detention at the port of loading. This will make the contract just and reasonable, and it may be fairly held that the parties contemplated this construction. It is because I have future decisions in my mind that I can construe this clause as a discharge of the liability of the charterer; otherwise I should be prepared to hold that the clause related only to breaches after the ship was loaded, and the charterer was liable for any breaches happening before. But for the reasons I have stated I agree that the judgment of the Court below must be affirmed.

CLEASBY, B. In construing the clause in question, one may properly consider the object of introducing it. It is obvious that if it had reference to an enterprize of the charterer—that is, if he

was the merchant shipping his coals from Hull to Alexandria for sale there, the clause would be useless, because it could make no real difference to him whether he or his goods were to pay the freight or demurrage. But a captain whose ship is at Cardiff will not proceed to Hull upon the chance of finding a cargo or an incomplete cargo on which he could have a lien, and therefore he requires the liability of a responsible person that he shall have a cargo, and a complete cargo; but he is ready to agree that, as soon as he has a complete cargo, he will look to his lien, and the charterer makes himself liable till a complete cargo is loaded, and he is to be discharged afterwards. This is only the general idea; but, of course, in seeing what the effect of the clause is in each case, we must look at the language of each charter; and in considering the present case, as several judgments to which I have been a party have been referred to as authorities, I prefer to rest the conclusion rather upon reason than upon authority.

I think that the natural meaning of the words "liability to cease" is that the charterer's liability is to be put an end to upon a certain event, not that his obligation should cease as regards carrying into effect the contract afterwards. These words "liability to cease" were the words used in all the cases, such as *Oglesby* v. *Yglesias* (1) and *Milvain* v. *Perez* (2), where some matters, in respect of which the liability was to cease, were expressly matters which arose before the loading was complete, and where the words were held to put an end to a past liability, and not to a future obligation: see the judgment of Hill, J., in the last-cited case. So far as the position of the shipowner, as well as of the charterer, is concerned, it makes no difference whatever whether the demurrage accrues at the port of loading or at the port of discharge. In either case the shipowner has his lien, and it does not appear to be reasonable to hold that, if the demurrage accrued at the port of discharge, the charterer should be released, as the shipowner could look to his lien, but if it occurred at the port of loading he could not.

No argument was addressed to us in the present case upon the difficult question whether the charterer would be discharged from

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356. (2) 3 E. & E. 495; 30 L. J. (Q.B.) 90.

7 Jur. N. S. 336

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liability for unliquidated damages in respect of detention, as distinguished from the agreed payment for demurrage during ten days. On this question I will only remark that the clause may fairly be considered as referring to those matters, such as payment, which are contemplated as arising upon the contract, and not to those which arise from a breach of the contract by detention. The same difficulty as regards detention would arise whether it took place at the port of loading or of discharge.

In the present case, notwithstanding the place where the demurrage clause occurs, I feel satisfied that if the ship occupied more than thirteen days in loading—say fifteen days—that two days would go down as demurrage, and that if there was no further demurrage at the port of discharge, the plaintiff would be entitled to recover the two days as demurrage, and to have his lien for it, and would not be put to an action for detention. It appears to me, therefore, that this action is brought for demurrage covered by the lien, and that the defendant is discharged from that liability.

GROVE, J. I am of the same opinion. I agree substantially with what has fallen from my Brother Brett. If I had to decide this case apart from authority, not only the grammatical, but also the normal, meaning of the sentence in question, "charterer's liability to cease when ship is loaded," would seem to me to be that the charterer was not to incur any fresh liability after the ship is loaded, there being a remedy for the shipowner by his lien; but that the charterer remains liable for breaches before the loading; the authorities, however, are too strong to be overruled even in a Court of error. I think it would so unsettle mercantile documents that I cannot adopt that construction which appears to be the reasonable construction.

With regard to the other questions, I agree with my Brother Brett.

POLLOCK, B. I am also of opinion that the judgment of the Court below must be affirmed.

I should certainly be prepared to hold that the cesser of liability and the operation of the lien must be taken correlatively, and that the charterer's liability is to cease only to the extent that

the owner has a lien on the cargo for freight and demurrage. This clause has had a meaning given to it by a series of decisions which it would be very undesirable now to disturb, and I think that *Francesco* v. *Massey* (1) was soundly decided, and that the cases there referred to were properly relied upon.

AMPHLETT, B. I am of the same opinion, and I would only add one word with regard to the clause making the charterer's liability to cease. It appears to me it must exactly coincide with the lien, otherwise there would be that great injustice which has been pointed out by my Brother Brett. The charterer's liability would be abrogated without giving the shipowner any compensation. There are two ways, and two ways only, in which that injustice could be remedied: either to say "the charterer's liability to cease" does not go beyond the freight and demurrage properly so called, which are subject to the lien; or to say that demurrage, where mentioned in the lien clause, includes what may properly be called detention. Either one or other of those constructions, I think, must be the right one. It is not for me to say which construction would be the right one—whether to limit the liability of the charterer, or to extend the lien, because we agree that there is in this case a demurrage properly so called, and therefore that the exemption from liability extends to the loading as well as to the unloading days. I agree with the rest of the Court that the judgment of the Court below must be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Shum, Crossman, & Crossman.*
Attorney for defendants: *R. B. Lowndes.*

(1) Law Rep. 8 Ex. 101.

1875
May 27.

CARTER *v.* SCARGILL.

Contract—Condition Precedent—Part Performance of Consideration.

1 App Cas 719
4 C P D 388

By an agreement between plaintiff and defendant of the 7th of September, 1867, after a statement of the weekly expenditure and profits of plaintiff's business as a printer and publisher of a newspaper, it was agreed that, in the event of the business being proved by the books kept by plaintiff to realize a clear profit of 7*l.* per week, as shewn by the above statement, defendant should pay plaintiff 50*l.* on the 24th of December, 1867, 50*l.* on the 24th of June, 100*l.* at Christmas, 1868, and 200*l.* within four years from the 25th of December, 1867. In consideration of the premises plaintiff agreed to sell to defendant all the plant and furniture on the premises, and the goodwill of the business, with all the earnings subsequent to the 30th of September, 1867, and the house and premises then occupied by plaintiff.

The defendant, on the 30th of September, 1867, entered into possession of the house, with the plant and furniture, and of the business, which he thenceforward carried on until he afterwards sold it. After the lapse of the four years, plaintiff brought an action for the instalments, and the defendant sought to set up as a defence that the business was not proved to be worth 7*l.* clear profit per week:—

Held, that, assuming that this, if the contract had remained executory, would have been a condition precedent, yet the defendant, having had a substantial part of the consideration, could not now set up the non-performance as a defence.

DECLARATION setting out at length an agreement between plaintiff and defendant. "An agreement, made the 7th of September, 1867, between Albert Carter (the plaintiff), of Luton, in the county of Bedford, printer and publisher of the *Luton Advertiser*, of the one part, and Frank Chapman Scargill (the defendant), of the same place, gentleman, of the other part.

"Estimated produce of the said Albert Carter's business:—

	£	s.	d.		£	s.	d.
Advertisements per week	8	0	0	Wages, &c. (items given)...	5	8	6
On sale of 2000 newspapers...	3	0	0	Rent, Rates, &c. (items given) ...	1	9	0
Jobbing	2	0	0				
Shop when stocked ..	1	0	0		6	17	6
				Sundries allowed if necessary, *i.e.*, understated	0	2	6
	£14	0	0		£7	0	0

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"It is agreed between the parties hereto that, in the event of the business now sold by Carter being proved by the books heretofore kept by Carter realizing a clear profit of 7*l.* per week, as shewn by the before-mentioned statement, then Scargill hereby agrees to pay to Carter the sum of 50*l.* on the 25th of December next, 50*l.* on the 24th of June following, 100*l.* in Christmas, 1868, and 200*l.* within four years from the 25th of December, 1867. Carter is to be entitled to 40*l.* worth of furniture now on the premises in King Street now occupied by him, exclusive of books and such property as belongs to Mr. Martin and Miss Matthews. Carter is entitled to receive all debts due to the said business up to the 30th of September, 1867, together with all debts due to him by purchase or otherwise, whether sued for or not. All advertisements unexpired and jobs not completed are to be allowed for by Scargill, pro ratâ, and paid for on the 30th of September instant. In consideration of the premises, Carter hereby agrees to sell to Scargill all the plant and furniture on the said premises, and also the goodwill of the said business. And it is hereby agreed, that Carter shall not print or publish any newspaper in Luton or Dunstable, but this proviso shall not preclude Carter from selling any newspaper in those places. The said A. Carter also agrees, in consideration of the premises, to sell to Scargill the house and premises now occupied by him, situate in King Street, Luton; and Scargill hereby agrees that he will release Carter from all debts and liabilities due by the said Carter to Scargill. Provided also, that Carter will, when desired by Scargill, renew all acceptances now running, so often as Scargill may consider requisite, pro formâ. Scargill hereby agrees to surrender the policy he now holds on the life of Carter, provided there is more than 30*l.* due on the house in King Street for instalments since last amalgamation, to be at liberty to vacate that part of the agreement. As witness, &c." [Signed by both parties.] The declaration then averred that the plaintiff did and performed all things required of him, and all things were done and happened and exist, and the time has elapsed for payment to him of the said 50*l.* on the said 25th of December, 1867, and the plaintiff recovered judgment against the defendant for the same, and the said sum of 50*l.* has been paid by the defendant to the plaintiff pursuant to the said

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judgment. And the said sum of 50*l.* on the said 24th of June, 1867, has since become due from the defendant to the plaintiff, and the plaintiff is entitled to be paid the same by defendant, and the time has elapsed for the payment of the said sums of 50*l.*, 100*l.*, and 200*l.* Breach: that the defendant has not paid any of the said sums.

Plea, inter alia, that, after the making of the agreement, and before a reasonable time had elapsed, defendant called upon plaintiff to prove by the books that the business then sold by the plaintiff realized a clear profit of 7*l.* per week, as shewn by the statement in the agreement; yet plaintiff refused to prove this, and the business did not in fact realize that profit, nor did the books in fact shew so large a profit.

Issue joined.

The cause was tried before Quain, J., at the sittings in London after Trinity Term, 1874. The facts and course of the trial, &c., are fully set out in the judgment.

April 28. *H. T. Cole, Q.C.*, shewed cause. He cited *Boone* v. *Eyre.* (1)

Graham and *Collyer*, in support of the rule, cited *Hunt* v. *Silk* (2); *Cutter* v. *Powell.* (3)

Cur. adv. vult.

May 27. The judgment of the Court (Cockburn, C.J., Quain and Field, JJ.) was delivered by

FIELD, J. This action was brought to recover three instalments of 50*l.*, 100*l.*, 200*l.*, alleged to have become payable by the defendant to the plaintiff under an agreement in writing between them, dated and signed on the 7th of September, 1867, and which is set out at length in the declaration.

The cause was tried before Quain, J., at the sittings after Trinity Term, 1874, when the learned judge directed a verdict for the plaintiff for the amount of the instalments, but reserved leave to the defendant to move to enter the verdict for him or a nonsuit, upon the ground that the plaintiff was not entitled under the agreement to recover unless the books shewed a profit of 7*l.* a week, as shewn by the statement in the agreement, and with a

(1) 2 W. Bl. 1312. (2) 5 East, 449.
(3) 2 Sm. L. C. 1.

further leave to move to reduce the damages to such sum as an arbitrator might find; and a rule having been obtained for that purpose, we are now called upon to decide whether such rule should be made absolute in either alternative, or be discharged.

At the trial the evidence was limited to putting in the agreement of the 7th of September, 1867, from which it appeared that the plaintiff was the printer and publisher at Luton of a newspaper there, and the subject-matter of the agreement was the sale of the plaintiff's business to and purchase of it by the defendant. It also appeared by it that the plaintiff occupied for the purpose of the business premises in King Street, where he owned furniture, worth 40*l.*, and some plant, and that he was indebted and under liabilities to the defendant for which, or part of which, he had come under acceptances which were running at the date of the agreement, and the amount of such debts or liabilities was probably secured by a policy held by the defendant upon the plaintiff's life.

Now upon the construction of this agreement it is clear that the consideration for the payment of the instalments now sued for consisted of the goodwill of the business and newspaper with all its earnings subsequent to the 30th of September, 1867, the pro ratâ benefit of all advertisements which should be unexpired and printing jobs not completed on that date, and the transfer of the house and furniture in King Street; and, although it must for the purpose of this rule be taken that the business was not proved by the books to realize the estimated profit of 7*l.* per week, yet it was admitted at the trial that in all other respects the agreement had been carried out on the plaintiff's part, and that on the 30th of September, 1867, the defendant entered into possession of the house with the plant and furniture, and also of the business, which he thenceforward carried on until he afterwards sold it; and thus that the consideration for the payment of the instalments for which this action is brought has been executed, with the sole exception that the business has not been proved to have realized the estimated amount; and the question now is, whether, under these circumstances, this fact amounts to an answer to this action.

Now, whatever might have been the question if it had been raised whilst the agreement was executory, we are clearly of opinion that, the defendant having received a substantial portion

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of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent: per Parke, B., in *Graves* v. *Legg* (1); *White* v. *Beeton* (2); and see the judgment of the Court in *Ellen* v. *Topp*. (3) This doctrine is well and firmly established, and is in accordance with principles of common sense and justice. In this particular case, if the reverse were true, a deficiency of one shilling per week would deprive the plaintiff of the whole of the stipulated price. And if it be urged on the part of the defendant that, on the contrary, if the business only realized one shilling per week, it would be unjust that he should pay the price which was estimated upon realization of 7*l.* a week, the answer is obvious, that in the interval between the date of the agreement and the 30th of September, and before taking possession, or within a reasonable time, he might have ascertained whether the condition he now alleges to be precedent was capable of being performed or not, and might, as soon as this was ascertained, have repudiated the agreement, and returned any portion of the consideration which he might have received in the meantime. Instead of doing so he entered into possession of, and carried on, and sold the business; and the fair inference is, either that he satisfied himself at the time that in substance the condition was capable of being performed, or that he was indifferent whether it was or was not, and that the agreement was of sufficient value to him for other reasons as to make it worth his while that it should be performed and acted upon.

We come, therefore, to the conclusion that that which might have been a condition precedent has ceased to be so by the defendant's subsequent conduct in accepting less than his bargain, if, in fact, there was any substantial deficiency.

The result, therefore, is that the condition in question in the present state of things goes only to a portion of the consideration, and that not a substantial portion; and the rule must therefore be discharged.

Rule discharged.

Attorney for plaintiff: *W. Bohm.*

Defendant in person.

(1) 9 Ex. at p. 716; 23 L. J. (Ex.) at p. 231.

(2) 7 H. & N. 42; 30 L. J. (Ex.) 373.

(3) 6 Ex. at p. 441; 20 L. J. (Ex.) at p. 245.

M'QUEEN *v.* THE GREAT WESTERN RAILWAY COMPANY. 1875

June 1.

Carrier of Goods—Felony of Servants—Evidence—Carriers Act, 11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68, *s.* 8.

The plaintiff delivered to the defendants, a railway company, a case of drawings, of greater value than 10*l.*, to be carried from C. to L. The defendants' servants at C. put it into a truck, which was shunted into a siding of easy access to the public. The case was stolen by some one at C. The plaintiff having sued to recover the value of the drawings, the defendants pleaded under the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), to which the plaintiff replied felony by the defendants' servants. At the trial the judge, on the authority of *Vaughton* v. *London & North Western Ry. Co.* (Law Rep. 9 Ex. 93), directed the jury that if the facts, in their opinion, were more consistent with the guilt of the defendants' servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendants' servants:—

Held, a wrong direction: for that the greater probability that the goods were stolen by the defendants' servants merely arose from their having greater opportunity of committing the theft; and that this alone did not make out a primâ facie case that the felony had been committed by one of the defendants' servants.

DECLARATION for not carrying a parcel of drawings from Cardiff to London, and there delivering them.

Plea, that the goods were within the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), and were above the value of 10*l.*, and were not declared or insured.

Replication, that the loss of the goods was occasioned by the felonious act of the defendants' servants.

Issue thereon.

At the trial, before Cockburn, C.J., at the sittings in Middlesex, after Michaelmas Term, 1874, it was proved that on the evening of the 29th of August, 1873, the plaintiff's agent delivered a case containing water-colour drawings to the defendants at Cardiff, to be forwarded from Cardiff to London. The case was addressed to the plaintiff, and marked, "Valuable pictures. With care." It measured 48 inches by 30 inches, and weighed 1 cwt. 16 lbs. No declaration was made of the contents and value of the case, nor was it insured. The next day the defendants' servants put the case into a truck, into which a seaman's chest was also put, and the two were covered over with a tarpaulin. A number of empty boxes were put round them. About one o'clock the truck, being

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loaded, was placed on a siding, which was half a mile in length and formed part of the goods station, to await the departure of the 8.20 p.m. goods train for London, to which it would have to be attached.

The goods station at Cardiff extends about a mile in length, and was laid down with two sets of rails or sidings, over which were two level crossings, so that any person coming on to the level crossings could, if they pleased, get into any part of the goods station. On one side the fence was a low paling, over which persons outside could easily climb, and so obtain access into the station; on the other side there were two gates, a cart-gate and a foot-gate. A number of persons came through the cart-gate with carts bringing and taking away goods to and from the station. After six o'clock the cart-gate was locked, but the foot-gate was open day and night. Persons other than the company's servants used the goods station as a thoroughfare, to get from one part of the town of Cardiff to another. On the arrival of the goods train at London the next morning the case was missing, and the seaman's chest had been broken open, and the cords with which it was fastened had been cut.

It was admitted, on behalf of the defendants, that the case must have been stolen by some one from the truck while standing in the goods station, but it was contended that there was no evidence of a felony having been committed by the defendants' servants. No witnesses were called on behalf of the defendants.

Cockburn, C.J., at the request of the plaintiff's counsel, on the authority of *Vaughton* v. *London and North Western Ry. Co.* (1), left the question to the jury whether the case had been stolen by any of the defendants' servants, directing them that, if the facts, in their opinion, were more consistent with the guilt of the defendants' servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of their servants.

The jury found a verdict for the plaintiff for 365*l.*, leave being reserved to the defendants to move to enter a verdict for the defendants or a nonsuit.

A rule was afterwards obtained on the ground that there was no

(1) Law Rep. 9 Ex. 93.

evidence to go to the jury of a felony having been committed by the defendants' servants.

Digby Seymour, Q.C., and *Lumley Smith*, shewed cause. If, on the state of facts proved at the trial, it was more probable that a felony had been committed by the company's servants than by any one else, the jury might come to the conclusion that the servants of the company had committed the felony: *Vaughton* v. *London and North Western Ry. Co.* (1) Here the company's servants had greater facility of access to the truck and to the station than the public had, and if they were found with the case in their possession it would excite no suspicion, but if one of the public were seen with it he would be questioned. One of the public could not carry away a package of the size of the case without attracting notice. The case was labelled "valuable pictures;" the company's servants, therefore, had a knowledge of its contents, and knew exactly its position in the truck; a stranger would not know the contents of the case, nor where it was to be found. The facilities which the company's servants had to commit the theft were far greater than those of the public. The plaintiff made out a primâ facie case that a felony had been committed while the case was in the possession of the defendants, and the defendants ought to have called evidence to rebut that primâ facie case. In *Boyce* v. *Chapman* (2) the plaintiff proved only circumstances of suspicion that a parcel had been stolen by a porter in the defendant's service, and the defendant having failed to call him as a witness, the Court refused to disturb a verdict which had been found for the plaintiff.

[COCKBURN, C.J. Can you reconcile *Vaughton* v. *London and North Western Ry. Co.* (1) with *Metcalfe* v. *London and Brighton Ry. Co.*? (3)]

That case was decided on the authority of *Great Western Ry. Co.* v. *Rimell.* (4) *Vaughton* v. *London and North Western Ry. Co.* (1) was approved of in *Gogarty* v. *Great Southern and Western Ry. Co.* (5)

Thesiger, Q.C., and *Masterman*, in support of the rule. *Gogarty*

(1) Law Rep. 9 Ex. 93.
(2) 2 Bing. (N.C.) 222.
(3) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 333.
(4) 18 C. B. 575; 27 L. J. (C.P.) 201.
(5) 8 Ir. Rep. C. L. 344.

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v. *Great Southern and Western Ry. Co.* (1) was, in some measure, founded on *Vaughton* v. *London and North Western Ry. Co.* (2); but the case was decided chiefly on its own facts. The box which was stolen was proved to have been in the possession of a porter of the company, and the Court, in their judgment, say, "We are of opinion that it having been clearly proved that the box was seen in the possession of a porter in the employment of the company—who has not accounted for it in any way—and no case having been made out at the trial of any other kind of loss save the case for the plaintiff—the verdict ought not to be disturbed." The dictum of Pigott, B., in *Vaughton* v. *London and North Western Ry. Co.* (2) was not necessary to support that case, and apart from that dictum, the case is not inconsistent with other cases. In *Boyce* v. *Chapman* (3) the property alleged to have been stolen was traced to a porter in the employment of the carrier, and no explanation was given as to how he became possessed of it. In the present case there is no evidence whatever of any felony by any servants of the company. The plaintiff has not made out even a primâ facie case. He has not shewn that any particular servant of the company was seen dealing with the contents of the box, nor has he given in evidence any fact connecting any servant of the company with the theft. There was absolutely nothing for the defendants to answer.

COCKBURN, C.J. I am of opinion that the rule must be made absolute to enter a nonsuit. There was not sufficient evidence to go to a jury of a felonious stealing by the company's servants. The case of *Vaughton* v. *London and North Western Ry. Co.* (2), which has been relied upon on the part of the plaintiff, does not, so far as the present rule is concerned, apply. We must bear in mind the provisions of the Carriers Act, which was passed for the protection of carriers, who are exposed to serious losses, and who have claims made upon them for parcels of which the value is quite disproportionate to the amount paid for carrying them. The legislature has excepted from the protection and immunity thus given to carriers the case where property is lost by reason of its having been taken feloniously by the servants of the carrier. That provision gives the carriers the highest possible motive to

(1) 8 Ir. C. L. Rep. 344. (2) Law Rep. 9 Ex. 93.
(3) 2 Bing. (N.C.) 222.

take care and employ honest servants. I think that if we did not interpret that section with the weight which it ought to carry with it, we should fritter away the Act of Parliament, which was intended for the protection of the carrier. We must take care, therefore, where there is a replication to a plea under the Carriers Act that there has been a felonious taking by the carriers' servants, that we do not take away anything from the degree of proof required to establish the fact. I quite agree with the doctrine involved in the decision of the Court in *Vaughton* v. *London and North Western Ry. Co.* (1) to this extent: that it is not necessary to shew, in order to make out a replication of a felonious act on the part of the carriers' servants, that the taking was by any particular servant or servants. It is enough, if there is proof to satisfy the jury that the taking was by some one who was more or less one of the company's servants, without specifying the particular servant. But we are now dealing with the propositions involved in the direction which I gave to the jury in this case upon what I then considered to be the substance of the judgment of Pigott, B., in *Vaughton* v. *London and North Western Ry. Co.* (1) The language of that judgment, however, I think, when we apply it to the particular facts of that case, must be understood in a much more limited sense than that which it would at first appear to have when looked at with reference only to the words and the language used. Looking at the language of that judgment, which I followed almost verbatim in the direction I gave to the jury in this case, it comes to this—that where in the opinion of the jury the facts are more consistent with the guilt of the defendants' servants than that of any person not in their employ, then the carrier is called upon for an answer; and if the conduct of certain persons is impugned, and those persons are not called as witnesses, the inference would be that a felony had been committed by them. I think that proposition is not maintainable. It appears to me that the question of probability or improbability can only be considered as an element in the consideration of the general case.

But in considering whether the proposition that in fact a felony has been committed by the company's servants, has or has not been established, or whether the suspicion is that they have been

(1) Law Rep. 9 Ex. 93.

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guilty of felony rather than that a stranger or strangers have been, the greater or less degree of probability cannot be an element in the consideration of the question.

When you are comparing the case as between A. and B. as to which of them stole a certain thing, it may be that there is a greater degree of likelihood that A. stole it than B., yet you must not, because it is more likely that A. stole it than B., presume that A. is guilty, and is the thief. That would not be consistent with logic or sound sense, and I think that that proposition is involved in the direction given. If a primâ facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that primâ facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the primâ facie case. But that always presupposes that a primâ facie case has been established; and unless we can see our way clearly to the conclusion that a primâ facie case has been established, the omission to call witnesses who might have been called on the part of the defendants amounts to nothing. I cannot say that a primâ facie case was made out calling upon the company for an answer, and if not, then they would be entitled to take their stand on the evidence as it existed.

It really comes to this—there is a greater degree of probability that the railway company's servants took these goods than that a stranger took them, by reason of their greater facility of access and opportunities of stealing them, yet it is merely a question as between the railway company's servants and anybody else, and there is nothing whatever to point to the railway company's servants particularly, with the exception of the greater facility of access.

I am therefore of opinion that the verdict obtained was wrong, and that we ought not to send the case down for a new trial, but that the rule to enter a nonsuit should be made absolute.

MELLOR, J. I agree that the rule to enter a nonsuit ought to be made absolute. The plaintiff's case, as proved at the trial,

amounted to this, that the railway company's servants had had some opportunity given to them to believe that the box contained something of value. It was packed in a truck, surrounded with boxes and other things, with a tarpaulin over it, and the truck was placed on a siding for the purpose of being attached in due course to some train that should carry it to its destination. But in the course of the trial it also came out as a matter of evidence that the truck was placed in a siding at the goods station, at which there is a large amount of business transacted, where people come and go, and where the fence against any marauders was of the slightest character, it was a fence which every one who was so disposed might easily get over; and in that state of things there were abundant opportunities for some stranger to come and steal the parcel out of the truck standing on the siding. There was nothing to shew that the company's servants had taken the parcel except the greater knowledge or facility which the company's servants had. On the other hand, there was abundant opportunity for any other person to come and steal it. Although it might be that the probability was greater that the case was stolen by one of the company's servants than by a stranger, and although that probability weighed, and ought to weigh, with a jury when they have got before them facts sufficient to raise a primâ facie case to charge the company, still if the plaintiff fails to make out a primâ facie case, then the fact that it was more probable that the box was stolen by the company's servants than by a stranger, is not sufficient to establish that a felony has been committed by the company's servants. The evidence in this case merely amounts to this, that there was greater facility on the part of the company's servants to take this parcel than the general public. If it be said that in this case there was sufficient evidence of a felony to make a carrier liable, the Carriers Act would afford no protection to carriers, and the owner of goods might recover against the company merely by shewing a loss by a felonious act. But the statute only makes the carrier liable when the goods are lost by the felonious act of their servants, and there must be evidence that the felony was committed by the company's servants. That primâ facie puts the proof of felony upon the person who seeks to recover against the carrier. He must do more than shew that the goods have been lost by a felony having

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been committed, he must shew by reasonable evidence, so as to raise a primâ facie case, that the goods were stolen by the company's servants. I think the plaintiff here failed in doing that. I am satisfied, unless there were some independent fact besides the fact of greater facility on the one side than on the other, it is not a case to satisfy the words of the Carriers Act.

I entirely agree with what my Lord has said that *Vaughton* v. *London and North Western Ry. Co.* (1) is principally valuable as deciding that it is not necessary to shew that some particular servant has committed a felony, but that it is sufficient if some evidence is given which raises a primâ facie case that the article was stolen by some or one of the carrier's servants. I think the observations of Pigott, B., where applied to the circumstances of *Vaughton* v. *London and North Western Ry. Co.* (1) might bear a narrower construction than that put upon them by the plaintiff's counsel. Certainly there are circumstances in that case which distinguish it from the present, and I think we are not called upon to do more than to say that the observations attributed to Pigott, B., are extra-judicial and beyond the necessity of the occasion, and do no affect this case. The actual decision in *Vaughton* v. *London and North Western Ry. Co.* (1) is quite consistent with our present decision.

QUAIN, J. The plaintiff must bring himself within s. 8 of the Carriers Act, and prove that the loss arose from a felonious act on the part of the company's servants. That is essential; how does the plaintiff propose to do that? The case starts with the fact that the box was placed in a truck on a long siding, awaiting its journey to London; that it was left on this siding, which is said to be a mile long, and which contained a great number of trucks. It was proved, undoubtedly, that the public had, practically, access to the siding; that a large number of the public availed themselves of it, and passed across it as a short cut, and that up to six o'clock the gates of the goods station were open to carts and carriages. After six o'clock the carriage gates were shut, but there was a side gate for the foot-passengers, through which anybody could have entered. Therefore the case starts with the fact that the box was placed in such a position that the public

(1) Law Rep. 9 Ex. 93.

had access to it as well as the company's servants. The only evidence that I can find from which it would be presumed on behalf of the plaintiff that a felony had been committed by one of the company's servants, rather than by one of the public, is that the company's servants had greater facility of access—that is to say, they might have gone into the different parts of the station without question, whereas strangers might have been questioned. But how can we, when the station is open to the public as well as to the company's servants, say, because the company's servants have greater facility of access, that that is evidence to go to the jury that the felony was committed by the servants of the railway company, and not by one of the public? I think that we cannot. In my opinion, if we were to hold that there was such evidence, we should be reducing the statute to a dead letter, and depriving the carrier of that protection which the statute gives him. As to the fact relied on by the plaintiff—namely, the greater facility of access, that might exist in every case. The moment goods were delivered to the company's servants to be carried by them, they would have greater facility of access to them than the public; therefore we should, in fact, hold in every case where goods are delivered to be carried, because the servants had greater facility of access, although the public had access as well, that would be evidence to go to a jury that a felony had been committed by the servants of the company, and not by the public; and in every case there would be a verdict against the company. In addition to the greater facility of access, special facts must be adduced shewing it was almost an impossible consequence that a felony could have been committed by the public, and that therefore it must have been committed by one of the company's servants. I fully adopt the language of Willes, J., in *Metcalfe* v. *London Brighton and South Coast Ry. Co.* (1), in which he said "the plaintiff might have shewn a primâ facie case, if it had happened that the box could not have been exposed so that other persons coming to the railway might have access to it." So far from that being proved here, it is shewn beyond all doubt that other persons might have access to the station, and therefore it was requisite to shew that the box was in the special custody of the company's servants, and under such circumstances and in such a manner as

(1) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 332.

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to render it almost impossible that it could have been stolen by anybody else. If that had been so, a primâ facie case might have been made out; but in my opinion it is not so on the evidence here. With regard to *Vaughton* v. *London and North Western Ry. Co.* (1), it seems to me, looking at the facts of that case, that it has no bearing on the present case, because, in that case, two of the servants of the company were distinctly charged with special acts: first, the carter who signed for three parcels, and only produced two; and the next, the very strong fact that one of the company's servants was actually found in possession of part of the jewellery. It is true that he said he found it, which would be the usual excuse under such circumstances; but there was the strong fact that he was not called to prove that he found it, nor was the carter called to prove that he had not received the parcel for which he had actually signed the bill. There the Court said, Why were not these people called? the fraud is traced directly to the servants of the company. If they were not called, the jury were justified in finding a verdict for the plaintiff by reason of their felonious act. That case does not govern the present; and on the ground that the plaintiff gave no evidence of any special fact warranting the jury to find that a felony had been committed by the servants of the company rather than by one of the public, beyond the mere fact that the servants had greater facility of access, which, in my opinion, is not enough, I think the rule ought to be made absolute to enter a nonsuit.

Rule absolute.

Attorneys for plaintiff: *Lewis & Lewis.*
Attorney for defendants: *R. R. Nelson.*

(1) Law Rep. 9 Ex. 93.

[IN THE EXCHEQUER CHAMBER.]

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June 16.

THE QUEEN, ON THE PROSECUTION OF HER MAJESTY'S SECRETARY OF STATE FOR THE HOME DEPARTMENT, *v.* THE VISITING JUSTICES OF THE COUNTY PRISON OF LEWES, IN THE COUNTY OF SUSSEX.

Criminal Lunatic, Inquiry as to the last legal Settlement of—By whom Inquiry to be made—3 & 4 Vict. c. 54, *s.* 2—27 *&* 28 *Vict. c.* 29, *s.* 2—*The Prison Act,* 1865 (28 *&* 29 *Vict. c.* 126) *s.* 66.

By s. 1 of 3 & 4 Vict. c. 54: "If any person, while imprisoned in any prison under any sentence of death shall appear to be insane, it shall be lawful for any two justices of the peace of the county or place where such person is imprisoned to inquire into the sanity of such person." By s. 2: "In all such cases as aforesaid it shall be lawful for such two justices, or any other two justices of the peace of the county or place where such person is imprisoned, to inquire into and ascertain the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and make an order if necessary." By s. 1 of 27 & 28 Vict. c. 29, s. 1 of 3 & 4 Vict. c. 54 is repealed, and by s. 2 the secretary of state may himself direct an inquiry as to sanity, either from information by means of a certificate transmitted by two or more of the visiting justices of the prison in which such prisoner under sentence of death is confined, or by any other means whatsoever. By s. 66 of 28 & 29 Vict. c. 126: "Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, and the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the prison authority shall, for all purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority."

The council of the borough of B., under s. 31 of the Prison Act, 1865 (28 & 29 Vict. c. 126), entered into a contract with the justices of the county of S. for the receipt and maintenance in the county gaol at L. of all prisoners maintainable at the expense of the borough of B. E. was committed to the gaol at L. under a warrant of a magistrate of B. to take her trial upon a charge of murder committed within the limits of the borough, and was afterwards found guilty and sentenced to death, and was received and maintained in the county prison at L. under the contract; and while she was so imprisoned she became insane:—

Held, affirming the judgment of the Court of Queen's Bench, that the justices of S. were the justices to make the inquiry into the sanity, &c., of E. under s. 2 of 3 & 4 Vict. c. 54, as they were the justices of the county or place where E. was imprisoned; and that the gaol of L., though the prison of the council of B. within the meaning of s. 66 of 28 & 29 Vict. c. 126, could not be said to be within B.; and the justices of B. had therefore no jurisdiction.

ERROR on the judgment of the Court of Queen's Bench in

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favour of the prosecution on a demurrer to a return to a mandamus: ante, p. 166.

June 15. *C. Bowen*, in support of the demurrer.

Cohen, Q.C. (*Lumley Smith* with him), contrà.

The arguments were the same as in the Court below.

Cur. adv. vult.

June 16. CLEASBY, B. The question in this case is, who are to discharge the duty prescribed in s. 2 of 3 & 4 Vict. c. 54. By that section it is enacted that it shall be lawful for such two justices of the peace of the county or place where such person is imprisoned to inquire into and ascertain . . . of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person . . . Then the section provides that, when the place of settlement is ascertained, the two justices shall make orders on the officers of the place of settlement for the payment of certain charges, and for the maintenance of such insane person; and if the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county. By s. 1 of that Act, if any person imprisoned in any prison under sentence of death shall appear to be insane, any two justices of the peace of the county or place where such person is imprisoned are to inquire as to the sanity of such person, and if such person is found to be insane, the secretary of state is to order his removal to a lunatic asylum. That section however is repealed by 27 & 28 Vict. c. 29: and by s. 2 of this Act, if any person confined under penal servitude or imprisonment should appear to be insane, it shall be lawful, if such person is confined in a prison to which visiting justices are appointed, for two or more visiting justices of such prison, or if such person is in any other place of confinement, for two or more justices of the county in which such place of confinement is situate, and such visiting or other justices are hereby required, to call to their assistance two physicians or surgeons, and to inquire with their aid as to the insanity of such person, and if it be certified that the prisoner is insane, the secretary of state may order his removal to a lunatic asylum; and in the case of a

prisoner under sentence of death becoming insane, the secretary of state, as it is essential in such cases that there should be no delay, is empowered to act at once, with or without any representation from justices, and cause an inquiry to be made into the insanity of such prisoner. The persons who are empowered to make an inquiry as to the insanity of a prisoner under s. 2 are the visiting justices of the prison where the prisoner is confined. They are from their official position persons likely to be furnished with information as to a prisoner's insanity. It seems to me more convenient to hold that the justices of the place where the prisoner is confined, and who have held the first investigation, and therefore who are acquainted with the circumstances connected with the prisoner, should do what is required by s. 2 of 3 & 4 Vict. c. 54, and it would be inexpedient that justices from another jurisdiction should be introduced. Reliance is placed by the defendants upon the provisions of s. 66, that the prison to which the prisoner is removed pursuant to contract shall be deemed to be the prison of the authority bound to detain him, that is, in this case, the justices of the borough of Brighton; and it has been argued that they ought to hold the investigation under s. 2 of 3 & 4 Vict. c. 54. I do not think an accident which cannot be supposed to have been within the contemplation of the contracting parties can be said to be a matter incidental to the prisoner's commitment, trial, detention, and punishment. I think the object of s. 66 was merely to legalise the transfer of a prisoner from the custody to which he was originally committed to a more convenient prison, in which, however, it would be unlawful to detain him without some provision of this kind. It has been argued that a hardship has been imposed upon the county by making them possibly liable to the expense of maintaining the prisoner; but little weight can be given to that consideration, for by s. 65 the secretary of state is empowered to direct any person in prison to be removed from the prison in which he is confined to any other prison within England or Wales, there to be imprisoned during his term of imprisonment: however, if there is any hardship, it ought to have been provided for by the terms of the contract between the borough of Brighton and the county of Sussex,

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GROVE and DENMAN, JJ., and POLLOCK and AMPHLETT, BB., concurred.

Judgment affirmed.

Attorneys for prosecution: *Raven & Hare.*
Attorney for defendants: *Jones, Lewes.*

June 8.

HARGREAVES, APPELLANT; DIDDAMS, RESPONDENT.

Justices, Jurisdiction of—Bonâ fide Claim of Right—Fishing in navigable River—24 & 25 Vict. c. 96, s. 24.

SQBD628
631,
9QBD164

A river was made navigable by a company and the public allowed to navigate it on payment of tolls, under certain Acts of Parliament; but the soil and rights of the owners on each side of the river remained untouched. The public had fished for many years in the river without interruption by the owner of the soil; but he caused a notice to be set up forbidding all fishing. The appellant afterwards fished in the river, and an information was taken out against him under 24 & 25 Vict. c. 96, s. 24. At the hearing the appellant set up the right in the public, and contended that the jurisdiction of the justices was ousted by this bonâ fide claim of right:—

Held, that the right set up could not exist in law, and therefore title could not come in question, and the jurisdiction of the justices was not ousted.

Hudson v. *Macrae* (4 B. & S. 585; 33 L. J. (M.C.) 65) followed.

CASE stated by justices of the county of Southampton under 20 & 21 Vict. c. 43.

The appellant appeared to an information by the respondent charging that the appellant, within the space of six calendar months last past, to wit, on the 8th of July, 1874, at the parish of South Stoneham, in the said county of Southampton, by angling in the day time, unlawfully and wilfully did attempt to take certain fish called trout, in certain water there, wherein Thomas Chamberlayne then had a private right of fishery, and not running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, contrary to the statute (24 & 25 Vict. c. 96, s. 24).

The water mentioned in the information is a part of the ancient channel of the river Itchen, in the county of Southampton, which was made navigable originally by a private company only, and

afterwards by the public on payment of tolls to the company, under certain Acts of Parliament.

In the month of March, 1874, Chamberlayne caused to be erected on the towing-path running along the western bank of the river Itchen, near Bishopstoke, and upon land of Chamberlayne, at or near the place where the appellant subsequently fished, some boards with notices on them to the following effect:—

"The fishing in this water, being private property, is now strictly preserved. Any person found fishing therein without permission from the proprietor will be proceeded against according to law.

(Signed) "Lee & Best, Solicitors for the said Proprietors."

On the 1st of July, 1874, the appellant, who resides on the opposite bank of the river, caused to be sent by his solicitor a letter to Messrs. Lee & Best, stating his intention to fish in the river on the 8th of that month, at the place where the boards were erected, and also notifying that his solicitor would accept service of process if any action were brought against him for so fishing. In reply to the letter, Messrs. Lee & Best wrote to the effect that any person fishing at the place above referred to would be treated as a trespasser.

The appellant, on the 8th of July, 1874, fished with rod and line in the daytime in the part of the river Itchen mentioned in his notice. That part of the river is above the flow of the tide, but was made navigable as already mentioned.

It was proved that the soil of the adjacent bank and of that of the river where the appellant fished was the private property of Chamberlayne, but that for many years the public had fished in the river, at the same place where the appellant fished, openly and in the daytime, without applying for permission from any one, and without being prevented or interrupted by the keepers of Chamberlayne or any one, and in the belief that the public had a right to fish there. The witnesses called on behalf of the appellant were unable to shew any documentary legal origin of such right.

The appellant put in evidence an Act of Parliament of the 16 & 17 Car. 2, No. 24, entitled "An Act for making divers rivers navigable, or otherwise passable, for boats, barges, and other

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vessels," whereby, among other things, certain persons were empowered to do divers acts for the making navigable the said river Itchen from Alresford through Winchester to the sea, and also the Act of 42 Geo. 3, c. 3, in which it was recited, among other things, that it would be advantageous to the public that the said river Itchen should be navigated, used, and enjoyed as a public navigable river, and by which it was enacted that all persons whosoever should, under stated restrictions and on payment of tolls and duties to the persons or company above referred to, have, use, and lawfully enjoy the free passage upon the said river with and for boats, barges, and other vessels, and should also have and use the towing or haling paths, wharfs, quays, and all other necessary powers for navigating the same and carrying on the commerce of the said river for the benefit of the public.

It was contended on behalf of the appellant that the river Itchen being a public navigable river, and the public having for many years fished in it as of right at the place in question, and the claim of the appellant to have the right to fish there as one of the public being made bonâ fide and with the view of having the question tried by an action at law, the jurisdiction of the justices was ousted.

Oh behalf of the respondent it was contended that the right of fishing claimed by the appellant as one of the public, whether by prescription or otherwise, was a right which it was impossible to acquire at law, and that therefore the jurisdiction of the justices was not ousted. And, further, that the river Itchen in the part in question was not a public navigable river in the ordinary acceptation of that term, and that the Acts of Parliament above referred to had created an easement or right of locomotion only, and had not otherwise affected the rights of the riparian owners, and that the fishing by the public at the place in question was a gratuitous concession by Chamberlayne, which he was at liberty to put an end to at any time without notice.

The justices decided that their jurisdiction was not ousted, and convicted the appellant in the penalty of 1s. and costs.

The question for the opinion of the Court was, whether the appellant, under the above circumstances, was legally and properly convicted of the offence charged in the information.

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Manisty, Q.C. (with him *Witt*), for the appellant. The appellant here clearly acted bonâ fide in claiming the right, offering to contest the point. In *Reg.* v. *Burrow* (1) this Court quashed a conviction where the defendant had set up a bonâ fide claim, as one of the public, to fish in Ullswater Lake. (2)

[LUSH, J. It was assumed there that it was not clear whether the defendant could have such a right or not.]

In *White* v. *Feast* (3) it was held that it was for the justices, under 24 & 25 Vict. c. 97, s. 52, to decide whether the accused acted under a fair and reasonable supposition that he had the right; but a mere bonâ fide claim of right is sufficient at common law to oust the jurisdiction of justices.

Kingdon, Q.C. (with him *Warry*), for the respondent. It is admitted in the case that the water is a private river, and only navigable by reason of the Act of Parliament, which expressly leaves the right of property and fishing as it was before. In *Murphy* v. *Ryan* (4) it was held that a claim by the public at large of a right of fishing, which is a profit à prendre, could not be sustained by the longest user, so as to raise a presumption of dedication. In *Hudson* v. *Macraę* (5) this very point was decided. And that was a stronger case than the present; for here, by the local statute 35 Geo. 3, c. 66, s. 65, all fishing is expressly prohibited, and persons navigating the barges are forbidden under heavy penalties to carry nets or even a fishing line.

Manisty, Q.C., in reply. In *Hudson* v. *Macrae* (5) it was admitted that the right claimed could not exist.

LUSH, J. I am of opinion that the conviction was right. It is true that this part of the river was made navigable to the public on payment of tolls under the Act of Parliament; but that did not affect the rights of the ownership of the soil which remained in Mr. Chamberlayne; and none of the incidents attaching to a navigable river up to the flow and reflow of the tide can properly attach here. That being so, the only title the appellant sets up is that of one of the public, and he contends that a bonâ fide claim

(1) Q. B. May 29, 1869; 34 Just. of Peace, 58.

(2) See also *Reg* v. *Stimson* (4 B. & S. 307); 32 L. J. (M.C.) 208.

(3) Law Rep. 7 Q. B. 353.

(4) Ir. Rep. 2 C. L. 143.

(5) 4 B. & S. 585; 33 L. J. (M. C.) 65.

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of such a right ousts the jurisdiction of the justices. But can such a right exist? I quite agree that it cannot. The only case cited as an authority for the appellant was the case which is only reported in the Justice of the Peace (*Reg.* v. *Burrow* (1)); but that proceeded on the ground that the point was not so entirely settled by authority as that the Court could say that the bonâ fide claim to the right did not oust the jurisdiction of the justices; the doubt on the point was the sole ground of the decision. Here we have *Hudson* v. *Macrae* (2), which is precisely like the present case; and the Court took judicial notice that such a right could not exist in the public, and therefore held that the bonâ fide claim did not oust the justices' jurisdiction.

QUAIN, J. I am of the same opinion. This was clearly not a navigable river above the flow and reflow of the tide. It was made navigable in the sense of being open for traffic by the public on payment of tolls; but the clause cited clearly shews it was not intended to alter any of the rights of the owner of the soil beyond this. Now on the question whether a person as a member of the public can acquire a right to fish in a non-navigable river, *Hudson* v. *Macrae* (2) is a direct authority that he cannot. In that case the public had fished for sixty years, and counsel very rightly admitted that such a right could not be acquired; and the Court held that as the right claimed could not by possibility exist, the setting up of a claim to such a right, though bonâ fide, could not oust the jurisdiction of the justices; because title could not really come in question. That is directly in point.

Judgment for the respondent. (3)

Attorneys for appellant: *Bedford & Metcalfe.*
Attorneys for respondent: *Lee & Best.*

(1) 34 Just. of Peace, 53. (2) 4 B. & S. 585; 33 L. J. (M. C.) 65.
(3) See *Watkins* v. *Major*, Law Rep. 10 C. P. 662.

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May 26.

Certiorari—Prohibition by Statute—Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), s. 26.

By s. 26 of the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), "No conviction under the authority of this Act, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form, or be removed by certiorari or otherwise into any of Her Majesty's Superior Courts of Record":—

Held, that this enactment precluded the issuing of a certiorari for the purpose of bringing up a case stated by justices in quarter sessions for the opinion of the Court.

RULE calling upon the defendant to shew cause why a writ of certiorari to bring up an order of the justices of Sussex in quarter sessions, affirming a conviction under the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), should not be superseded, quia improvide emanavit.

May 7. *Lord*, shewed cause.

Waddy, Q.C., supported the rule.

The facts and arguments sufficiently appear from the judgment.

May 26. The judgment of the Court (Blackburn and Field, JJ.) was delivered by

FIELD, J. The rule obtained in this case was to supersede a writ of certiorari quia improvide emanavit. The certiorari was for the purpose of bringing up to quash an order of the justices of Sussex in quarter sessions, whereby they conditionally affirmed a conviction of the appellant, under the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), subject to a case for the opinion of this Court. The writ of certiorari was issued for the purpose of bringing this case before the Court. The objection to it was that such a writ was absolutely prohibited by s. 26 of the Act, and could not issue even for this purpose; and we feel ourselves bound to yield to the objection.

The form of the commission of the peace, which gives the justices jurisdiction, appears never to have been altered from the first. It is found in Latin as it originally issued in Dalton's Justice of the Peace, p. 17, and in English, as it is now issued in Dickenson's Quarter Sessions, p. 59. And it contains the fol-

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lowing proviso: "Provided always that if a case of difficulty upon the determination of any of the premises, before you or any two or more of you, shall happen to arise, then let judgment in no wise be given thereupon before you or any two or more of you, unless in the presence of one of our justices of either bench, or of one of our justices appointed to hold the assizes in the aforesaid county." This not merely empowers but requires the justices in any case of difficulty to obtain the opinion of a judge; and by implication requires the judge to give his opinion. We can find no traces of the manner in which the presence of a justice of either bench at the sessions was ever obtained. The justices of the peace are required to attend at the assizes; which in early times was not, as it now is, a mere form; and there could be no practical difficulty in obtaining the presence of a justice of assize so long as the pressure of business was not so great as to prevent his having time to attend to the sessions business.

A practice, however, seems to have arisen by which, instead of adjourning the sessions to the assizes, and then deciding the case which the justices thought of difficulty in the presence of a judge of assize, the sessions stated the case on which they found difficulty in writing, and decided it according to the opinion of the judge of assize given upon that case; and we find traces of this practice being resorted to as late as the year 1734. But it was probably attended by inconveniences which led finally to its disuse in favour of the practice with which we are now familiar, of deciding the appeal conditionally and subject to the opinion of this Court upon any question of law stated by the justices upon a case reserved by them.

We cannot discover the time when this modern practice became established. It appear from an *Anonymous Case* (1) that as early as Hilary Term, 11 Wm. 3, an attempt was made to reserve a case for the opinion of the Court of King's Bench, but that Court refused to entertain it, and remitted it to the judge of assize. This was in the time of Lord Holt. It appears from the discussion in *Rex* v. *Tedford* (2) that in the time of Lord Hardwicke the modern practice existed, but had not completely superseded the old practice. In Nolan's Poor Laws (the first edition of which

(1) 2 Salk. 486.

(2) Barrow's Settlement Cases, 57.

was published in 1807) the practice of stating a case for the King's Bench is mentioned as having completely superseded the old practice of obtaining the opinion of a judge of assize.

The question whether a case was one of difficulty or not, fit to be reserved for the Court, was to be determined by the sessions, and not by the parties. But if they found it one of difficulty, and stated a case for the opinion of the Court, then it became necessary that a certiorari should issue to bring that case before the Court, that being the only mode by which the order could be brought into the Court having jurisdiction to quash or confirm it. But there can be no doubt that a great many orders good and valid, and worthy to have been upheld on the merits, were often quashed for some technical defect in an age in which technical and formal objections prevailed more than they happily do now; and hence it became common to insert in statutes a proviso that orders or convictions under these Acts should not be quashed for errors in form or removed by certiorari. We think it could hardly be the intention of the legislature that a provision so directed, and properly directed, against objections of a technical and formal character, should extend to exclude the jurisdiction of the Court to entertain any substantial question of law which the justices themselves are desirous of raising, this result being arrived at solely in consequence of an enactment prohibiting the putting in force of the formal machinery necessary for the purpose of bringing up the order from the Court below. And, if it were res integra, we should be much inclined to hold that writs of certiorari issued for the purpose of bringing up a case stated by the sessions were impliedly excepted from such enactments. But as far back as 1770, when the practice upon questions of bringing up cases was more recently established, the Court of Queen's Bench (Lord Mansfield being present) held that their jurisdiction was excluded by a similar provision in a Turnpike Road Act: *Reg.* v. *Micklethwayte.* (1) Again, in the more recent case cited in the argument of *Reg.* v. *Middlesex* (2), the same result was arrived at. And the rule was formally recognised in the subsequent case of *Reg.* v. *Dickenson* (3), although the judgment was given there

(1) 4 Burr. 2522.
(2) 8 D. & R. 117.
(3) 7 E. & B. 831; 26 L. J. (M.C.) 204.

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upon another ground. We are therefore clearly bound by this long-standing judicial construction of the provision in question to hold that we had no power to issue the writ in this case. It is, however, right to remark that Lord Kenyon in his day expressed an opinion that the practice of taking away the certiorari by statute had then become too frequent, and it does appear to us that the attention of the legislature should be specifically directed to the question, whether it is desirable to give this extensive effect to the clause prohibiting the certiorari, or whether the legislation adopted in ss. 107 and 108 of the General Highway Act (5 & 6 Wm. 4, c. 50), might not be extended to all Acts in which the certiorari is taken away, so as to provide a convenient mode of having any substantial question of law, upon which the justices have doubts, settled by the highest authority. In the language of Erle, J., in the last-cited case (1), we think that the restoration of this use of the certiorari "would be a salutary addition to the laws." Upon the argument of the rule, it was contended on behalf of the defendant that, whatever might be the effect of s. 26 in excluding the jurisdiction of this Act, the writ of certiorari in question, having been issued with the consent of the counsel for the informant, could not now be quashed. Even, however, had there been express consent of the parties, we are at a loss to understand how such consent could operate to give this Court a jurisdiction which the legislature has in express terms prohibited its having. It is true that, in the case of *Reg.* v. *Dickenson* (2), the Court did express an opinion in a similar case in compliance with the consent and wish of the parties; but this, if it can be justified at all, can only be so on the ground that the party there was precluded from raising the objection after having procured the case to be stated. In the present case the informant cannot be so estopped, as it appears that his counsel at the hearing of the appeal strenuously objected to any case being stated, relying expressly on this 26th section, and cannot, therefore, in any view be said to have procured it to be stated.

It is very unfortunate that the sessions should have disposed of the appeal, subject to the opinion of this Court on a case which cannot be brought before it. What the effect of this is must be

(1) 7 E. & B. at p. 838. (2) 7 E. & B. 831; 26 L. J. (M.C.) 204.

considered by the parties. It is not the question now before us. We can only say that the rule to quash the certiorari must be made absolute.

Rule absolute.

Attorney for prosecutor: *A. Leslie.*
Attorney for defendant: *H. J. Lynch.*

TAPP *v.* JONES; POOLEY, GARNISHEE.

May 7.

Attachment of Debt—Garnishee Order—Order for Payment—Accruing Debt—Order to pay when Due—Common Law Procedure Act, 1854, ss. 61, 62.

Under s. 61 of the Common Law Procedure Act, 1854, an order may be made not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor. It is not necessary to wait till the debt has become actually payable before making the order for payment.

2 CPD 11
14 QBD 64
641-3.
11 QBD 52
54-49
531
12 QBD 16

RULE to shew cause why two writs of execution against the garnishee should not be set aside, and why the order in pursuance of which they were issued should not be set aside or varied.

On the 21st of November, 1872, the plaintiff obtained judgment in the action against the defendant Jones; and on the 22nd of December, 1872, the sum of 590*l.* remained due upon the judgment. An agreement of September, 1874, was in force between Pooley, the garnishee, and the defendant, under which Pooley was bound to pay to the defendant a sum of money by monthly instalments of 10*l.* each.

On the 22nd of December, 1874, one instalment being due, an order was made by a master attaching all debts owing or accruing from the garnishee to answer the judgments. On the 31st of December another order was made by a master that the garnishee should pay to the plaintiff the debt then due by him to the defendant, and also the accruing debts as they became due. Writs of execution were issued in respect of two instalments.

Willis shewed cause. Sect. 61 of the Common Law Procedure Act, 1854, under which the order complained of was made, expressly authorizes the attachment of debts accruing as well as of debts due. And the latter part of the section which deals with

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the order to pay must be read as co-extensive with the former part, though the language is not exactly the same.

R. V. Williams, in support of the rule. There is no power to make an order for payment of future debts by the garnishee to the judgment creditor. The section, it is true, authorizes an order attaching "debts owing or accruing," but when it comes to speak of the order to pay it limits it to "the debt due." The language of s. 64, which provides the method of disputing his liability by the garnishee, is only applicable to a debt actually payable, and the forms shew the same thing: Reg. Gen. M. T., 1854, forms 24, 25. A right of set-off may accrue to the garnishee as against the judgment debtor between the date of the attachment and the debt becoming payable. An order for payment made in advance would deprive him of this.

[BLACKBURN, J. Is there any authority for saying that such a right of set-off could be asserted in any case on the ground of anything arising after the order for attachment?

FIELD, J. By s. 62 the attachment is to bind the debt. Is not that the governing date?]

In *Sampson* v. *Seaton Ry. Co.* (1) such a right of set-off is treated as clear. *Emanuel* v. *Bridger* (2) and *Ex parte Greenway* (3) can only be recognised by means of the distinction between debts due and debts accruing.

BLACKBURN, J. I think this rule must be discharged. The application is to set aside certain executions and to set aside or alter the order for payment under which they were levied. In this, as in other cases, there are two things, the order for attachment and the order for payment.

It is evident that the legislature had in view both present debt and future debt, debita in præsenti, solvenda in futuro, for it speaks in the earlier part of the section of "debts owing and accruing." Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered. It speaks merely of "the debt due." Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read

(1) Law Rep. 10 Q. B. 28. (2) Law Rep. 9 Q. B. 286.
(3) Law Rep. 16 Eq. 619.

"the debt due" as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as each falls due.

It is said that such an order, made in advance, might in some cases lead to inconvenience. That, if so, would be quite a sufficient reason in any particular case for declining to make an order at present binding accruing debts, if there were any room for doubt respecting them. But no consideration of that kind arises here.

Mr. Williams argued that this construction could not be the true one, because it would deprive the garnishee of a right. But he failed to shew this. I agree that no greater right is given to the creditor than the debtor had. It is obviously just that if a cross debt were due to the garnishee at the date of the attachment there should be a right of set-off in his favour, and I should strive hard to give effect to it if I could, though there would be difficulties in the way. But Mr. Williams goes further, and maintains the right to set off debts accruing after the attachment. For this I see no ground. On the attachment the thing is absolutely fixed; and there is no clause of mutual credit or set-off. What would have been wise or just I do not say; but the legislature has certainly said no such thing as that contended for.

I agree that the remedy provided in the sections and rules referred to for enforcing the claim against the garnishee are applicable to present debts; but I see no reason why they should not be made to take effect when the debt becomes due.

FIELD, J. I am of the same opinion. The question turns on the construction of s. 61 of the Common Law Procedure Act, 1854. The object was to give to a judgment creditor who cannot levy upon the chattels of his debtor a remedy against his debts. The section begins by speaking of the garnishee being "indebted" to the judgment debtor. If that stood alone the matter might be open to doubt. But the section goes on to speak of "debts owing or accruing." The object is, as the next section shews, to "bind

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such debts" for the benefit of the judgment creditor. Therefore, without deciding now as to a right of set-off existing at the date of the attachment, I think at least that the accounts must be taken at that time.

Then how is the judgment creditor to get at the money? It cannot be that the garnishee is to pay beforehand. But I think the words "debt due," in the latter part of the section are co-extensive with "indebted" in the former; and that an order for payment may be made as in the present case. It is true that cases of difficulty or hardship may arise; but in the majority of cases execution ought to be easy and rapid.

Rule discharged.

Attorneys for plaintiff: *Johnston & Harrison.*
Attorneys for defendant: *Harper, Broad, & Battcock.*

June 11.

MUIR *v.* KEAY.

Refreshment House—Licence—23 & 24 *Vict. c.* 27, *s.* 6—*Entertainment.*

18 D. 387. 388.-9, 390 392-4

By s. 6 of 23 & 24 Vict. c. 27, "all houses, rooms, shops, or buildings, kept open for public refreshment, resort, and entertainment," during certain hours of the night, are to be deemed refreshment houses and require a licence. The defendant's house was called The Café; it was found open during the night, and seventeen females and twenty gentlemen were there, and were supplied with cigars, coffee, and ginger beer, which they consumed. Upon these facts justices convicted the defendant upon a charge of keeping a refreshment house without a licence:—

Held, that the house was kept open for public refreshment, resort, and entertainment, and that the conviction was right.

CASE stated by two justices of Birmingham, under 20 & 21 Vict. c. 43.

Upon the hearing of an information preferred by the respondent against the appellant under 23 Vict. c. 27, s. 6, in the terms and to the effect following: "That after the passing of a certain Act of Parliament made in 1860, and entitled an Act for granting to Her Majesty certain duties on wine licences and refreshment houses, and for regulating the licensing of refreshment houses, and the granting of wine licences, and within six calendar months

before the day of exhibiting this information, to wit, on the 19th of December, now last past, to wit, at Birmingham, in the borough aforesaid, one William Muir, kept a refreshment house, for which a licence was and is required by the said Act, without taking out, or having taken out, or having in force, a proper licence in that behalf granted to him under the authority of the said Act, contrary to the form of the said Act," we convicted the appellant, and adjudged him to pay a mitigated penalty of 5*l*.

The following facts were proved or admitted before us, on the hearing of the complaint. (1) That the respondent was an officer of excise and the information was commenced and prosecuted by order of the Commissioners of Inland Revenue, and that the appellant was not licensed for the sale of beer, cider, wine, or spirits respectively, and had not taken out under the statute any licence to keep a refreshment house. It was also proved by Charles Fletcher, a constable of the said borough, that on the 19th day of December last, at 11.30 p.m., he visited the appellant's house, called the Café, situate in Lower Temple Street, in the said borough, and there found seventeen females and twenty gentlemen, that he knew some of the females, that the parties so assembled were supplied in his presence, and paid for cigars, coffee, and ginger beer, which were

(1) By 23 & 24 Vict. c. 27, s. 6, "All houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine, or spirits respectively, shall be deemed refreshment houses within this Act, and the resident owner, tenant, or occupier thereof shall be required to take out a licence under this Act to keep a refreshment house; and every person who shall keep any house, room, shop, or building, for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine, and spirits, sold respectively under a proper licence in that behalf) and every person who shall keep any house, room, shop, or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this Act to keep a refreshment house; and in all proceedings and upon all occasions whatever it shall be sufficient to describe by the term refreshment house, any house, room, shop, or building in which any such article as aforesaid (except as aforesaid) is sold to be consumed, or is consumed as aforesaid, without further or otherwise designating or describing the same."

By 24 & 25 Vict. c. 91, s. 8, ten o'clock at night is substituted for nine in the description of a refreshment house requiring a licence.

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then and there consumed by them, that he spoke to the appellant, and said to him that he was sent by order, and that he would be reported, and asked him if he was the proprietor, and that thereon the appellant said he was, but had no refreshment house licence.

On the part of the appellant it was contended, that he did not keep a refreshment house requiring him to take out a licence within the meaning of the statute, which defined a refreshment house to be a house, room, shop, or building, kept open for public refreshment, resort, and entertainment, between the hours of 10 p.m. and 5 a.m. of the following morning: That the coffee, cigars, and ginger-beer then and there supplied as stated, were not refreshments within the meaning of the same statute: That supposing they were held to be, still, that the appellant's premises were not open for any public entertainment in addition to the sale of refreshments, such entertainment being intended to comprise a musical or other public performance; and therefore that on both or either of the grounds last stated, the appellant had not committed the offence charged.

"On the part of the respondent it was contended that the sale of coffee, cigars, and ginger beer, was a sale of victuals or refreshments within the meaning of sect. 6 of the cited statute, and that "entertainment" was but another word for reception and refreshment.

"We, however, being of opinion that the premises of the appellant were kept and used by him as a refreshment house within the meaning of the cited statute, and that he had not taken out a licence under the statute, to keep a refreshment house, gave our determination against the appellant in the manner before stated.

"The question of law upon which this case is stated for the opinion of the Court, therefore is, whether the premises so occupied, kept, and used by the appellant are or are not a refreshment house within the statute."

Harris, for the appellant. The conviction was wrong. A licence is only needed when the house is kept open during the specified hours for "public refreshment, resort, and entertainment." Here what was supplied did not amount to refreshment. And the word "entertainment" must be something ejusdem generis with refreshment:

Taylor v. *Oram* (1); and something beyond refreshment. It means a musical entertainment, or other amusement of a like nature.

C. Bowen, in support of the conviction. Entertainment means reception. In some statutes it may have a narrower meaning, as, for instance, in the Corrupt Practices Act (17 & 18 Vict. c. 102, s. 23). But there is nothing in this section to narrow its meaning. It must be something which can be afforded in a shop.

Harris, in reply, referred to 25 Geo. 2, c. 36, s. 2.

BLACKBURN, J. We are all of opinion that the judgment of the magistrates was correct, and must be affirmed. The whole question turns upon the construction of s. 6 of 23 & 24 Vict. c. 27, which speaks of "houses, rooms, shops, and buildings kept open for public refreshment, resort, and entertainment." We have to consider whether the house in the present case was within those words.

The facts are, that the house was opened and called a café, that seventeen females and twenty gentlemen were there, and were supplied with and paid for cigars, coffee, and ginger beer, which they consumed; and on these facts the magistrates drew the conclusion that the house was within the Act. It is objected that the words are "refreshment, resort, *and* entertainment;" and that the entertainment intended must be a musical entertainment or other entertainment of a like nature; but this is not so. The word "public" must be read with each of the three words that follow it; and, notwithstanding what was said in the Court of Exchequer in the case cited, I do not think that entertainment need be something in the nature of refreshment. It is rather the correlative of resort—the reception and accommodation of the public who resort to the place in question. It is not a useless word. It does not apply to the mere giving of refreshment, nor to the mere fact of persons coming in; it means public reception. The question must always be one of more or less, and the facts of each particular case must be looked at as they arise. In the present case I think there was ample evidence that the house was kept for the purposes defined in the Act.

(1) 1 H. & C. 370; 31 L. J. (Ex.) 479.

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MELLOR, J. I am of the same opinion. I think there was evidence that the house was kept for public refreshment, resort, and entertainment. I agree in the explanation which my Brother Blackburn has given of those words.

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LUSH, J. I am of the same opinion. The real question is as to the meaning of the word "entertainment" in s. 6 of the Act referred to, which by a later Act has been altered so far as to change the hour from nine to ten in the evening, but not otherwise. There is no doubt that this house was kept open for public resort. It is then said, indeed, that what was supplied was not refreshment; but it clearly was so. But the main objection is, that there was no public entertainment, for that that means a musical or other public performance. I think that is wrong. I think entertainment is something connected with the enjoyment of refreshment-rooms, tables, and the like. It is something beyond refreshment; it is the accommodation provided, whether that includes a musical or other amusement or not.

Conviction affirmed.

Attorneys for appellant: *Austin, De Gex, & Harding, for Cheston, Birmingham.*

Attorney for respondent: *Solicitor to the Inland Revenue.*

June 12.

HOWARD, APPELLANT; LUPTON, RESPONDENT.

Pedlar—Certificate—Market—Pedlar using Horse—Hawker—Markets and Fairs Clauses Act (10 & 11 *Vict. c.* 14), *s.* 13—*Pedlars Act*, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 6.

By the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), s. 13, "Every person other than a licensed hawker" selling tollable articles within the limits prescribed by the special Act authorizing a market is liable to a penalty.

By the Pedlar's Act, 1871 (34 & 35 Vict. c. 96), s. 3, a pedlar is defined as a "hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot." By s. 6 a pedlar's certificate is operative within the police district in which it is taken out. And "for the purpose of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect within the district for which it is granted as a hawker's licence, and the term 'licensed hawker' in the

first-mentioned Act shall be construed to include a pedlar holding such a certificate":—

Held, by Blackburn and Mellor, JJ. (Lush, J., dissenting), that a pedlar holding a pedlar's certificate and trading within the district for which it was granted, but using a horse and cart and therefore not acting as a pedlar within the definition in s. 3 of the Pedlars Act, was yet within the exemption of s. 13 of the Markets and Fairs Clauses Act as extended by s. 6 of the Pedlars Act, and was not liable to a penalty for selling tollable articles within the limits prescribed by the special Act constituting a market.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Knaresborough an information was preferred under the 13th section of the Markets and Fairs Clauses Act, 1847, by John Howard (appellant), acting as inspector for the Harrogate Improvement Commissioners and Local Board of Health, against Thomas Lupton (the respondent), a market gardener living at Knaresborough, three miles from Harrogate, charging the respondent that he, on the 18th of March, 1875, at the township of Bilton and Harrogate, within the limits of the High and Low Harrogate Improvement District, did expose for sale in a certain place, not being his own dwelling-house or shop, certain articles in respect of which tolls were authorized to be taken in the market or marketplace opened for public use within the said improvement district, contrary to the provisions of the High and Low Harrogate Improvement Act, or the bye-laws made in pursuance thereof, or to the statute in that case made and provided. (1)

(1) By 10 & 11 Vict. c. 14, s. 13: "After the market place is open for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

By the Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3, "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot, and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft. . . ."

By s. 5, a pedlar's certificate is to be granted by the chief officer of police of a police district.

By s. 6, the certificate is to authorize the holder to act as a pedlar within the

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The facts were that the Local Government Act, 1858, was in the year 1864 adopted by the Harrogate Improvement Commissioners for their improvement district of High and Low Harrogate. The said Harrogate Improvement Commissioners having, as aforesaid, adopted the Local Government Act, 1858, and the Markets and Fairs Clauses Act, 1847, within their district, and by the former also become the Local Board of Health, provided a market-place and constructed a covered market, which was opened on the 29th day of August, 1874, and in further pursuance of the said Acts, on the 14th day of December, 1874, made bye-laws and a list of tolls, which bye-laws and tolls were duly confirmed by and passed under the seal of the Local Government Board.

That the respondent did on the 18th day of March, 1875, sell and expose for sale, both on foot and with a horse and four-wheeled waggon, from house to house in the streets of Harrogate, and within the said improvement district, certain articles, namely, potatoes, vegetables, and fruit, such articles being duly comprised in the list of tolls so confirmed and approved as aforesaid.

That the respondent at the time the alleged offence was committed held a certificate under the Pedlars Act, 1871.

On the part of the respondent it was contended that he could not be convicted on the ground that the respondent, at the time the alleged offence was committed, held a pedlar's certificate granted under the Pedlars Act, 1871, and having such, was by virtue of the 6th section of the same Act, a "licensed hawker" within the meaning of the 13th section of the Markets and Fairs Clauses Act, 1847, and entitled to sell potatoes, vegetables, and fruit, both on foot and with a horse and waggon.

On the part of the appellant it was contended that the respondent, by reason only of selling potatoes, vegetables, and fruit, was specially exempted by s. 23 of 50 Geo. 3, c. 41, from the operation of such statute, and, therefore, as he was hawking toll-

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police district in which it is taken out. And by the same section, "For the purpose of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect within the district for which it is granted as a hawker's licence, and the term 'licensed hawker' in the first-mentioned Act shall be construed to include a pedlar holding such a certificate."

able goods, he was amenable to the Market Clauses Act, 1847 (10 Vict. c. 14), as not being a "licensed hawker" within the meaning of s. 13 of that Act. And it was further contended that the respondent was, by reason only of selling potatoes, vegetables, and fruit, also specially exempted from the Pedlars Act (34 & 35 Vict. c. 96); and although a pedlar's certificate would exempt any person from the tolls who travelled or traded on foot, and otherwise complied with the Pedlars Act, nevertheless such certificate could give no further powers than those generally exercised under that Act by holders of such certificates, and hence a pedlar's certificate would not authorize respondent to travel and trade to another town or to other men's houses, and there hawk potatoes, vegetables, and fruit, either on foot or with a horse and waggon, the Pedlars Act only applying to persons who, without any horse or other beast bearing or drawing burthen, travel and trade on foot.

Our opinion as to such ground was that, as the respondent held a pedlar's certificate, he was a licensed hawker within the meaning of the 13th section of the Markets and Fairs Clauses Act, 1847, and as such was exempt from the operation of the 13th section of the said Markets and Fairs Clauses Act, and we therefore dismissed the information.

The question of law for the Court on this point was whether the respondent when hawking potatoes, vegetables, and fruit from house to house either on foot or with a horse or cart and not on foot, is a licensed hawker within the meaning of the 13th section of the Markets and Fairs Clauses Act, 1847, as defined by the 6th section of the Pedlars Act, 1871, and as such, by reason of holding a pedlar's certificate under that Act, exempt from the penalty of the said 13th section of the Markets and Fairs Clauses Act, 1847, either when selling on foot or with a horse and waggon.

A. E. Hardy, for the appellant. The 6th section of the Pedlars Act extends to pedlars the exemption from the restrictions of the Markets and Fairs Clauses Act, formerly confined to persons holding the more expensive hawker's licence. That licence authorizes a hawker to carry on his business anywhere,

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and with horses; whereas the pedlar's licence, which is much cheaper only allows the pedlar to travel within a police district, and on foot. The pedlar is therefore only within the protection of his licence when within his district and travelling and trading on foot. In the present case, by using a horse and waggon, he broke the conditions of his licence, and therefore could not claim its protection; and he ought to have been convicted. [He cited 50 Geo. 3, c. 41, s. 6; 21 & 22 Vict. c. 98, s. 50.]

No counsel appeared for the respondent.

BLACKBURN, J. I think the justices were right in this case; though, as my Brother Lush dissents, I think so not without doubt. I do not think the Markets and Fairs Clauses Act was passed with any view of protecting the revenue. But it provides that markets established under it are to have a monopoly, and accordingly s. 13 says: "Every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are authorized to be taken in the market, shall be liable to a penalty of forty shillings. The market is established and protected for the public benefit; but itinerant trading is not to be interfered with. If that view be right, then what says the Pedlars Act? It is a revenue Act. And whereas a hawker, who is free to travel all over the country, and may use horses and carts, pays for an expensive licence, it provides for the case of a pedlar, who is a trader of a much smaller class; and it allows him to travel through a limited district, and without horse or cart, on taking out a much cheaper licence. Then the Act says, in s. 6, As we have exempted hawkers from the operation of the Markets and Fairs Clauses Act, so, "for the purposes of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect, within the district for which it is granted, as a hawker's licence, and the term 'licensed hawker' in the first-mentioned Act shall be construed to include a pedlar holding such a certificate." We must then turn to s. 13 of the Markets and Fairs Clauses Act, and read it as if the words "pedlar holding a certificate" were expressly used in the exception. Mr. Hardy says we must read in the words "and acting

as a pedlar only." I doubt whether that could have been meant. And certainly I cannot read it in. I read it that while the pedlar has a pedlar's licence for the district, he is in the same position as if he had a hawker's licence for the whole country. If so, the justices were right.

MELLOR, J. I am of the same opinion, though I am a little startled by the possible operation of s. 7 of the Pedlars Act. But the doubt is not sufficiently strong to lead me to say the Justices ought to have convicted. I think the object of the certificate, as my Brother Blackburn says, is to encourage small itinerant trading; and I think the protection given by s. 6 is given to the person so long as he is within the district for which it is given. It is true, s. 7 speaks of his "acting as a pedlar within a new district upon getting his certificate indorsed." And it is difficult to say why he should not be in the same position in both districts. Probably he is so.

LUSH, J. I am sorry there is a difference of opinion among us. But I cannot come to the same conclusion as my learned Brothers. It seems to me that s. 13 of the Markets and Fairs Clauses Act exempts from the operation of the Act the well-known class of hawkers; and that this was in consideration of the duty paid by them. Afterwards pedlars were divided off from hawkers by the Pedlars Act. And by s. 3 "the term 'pedlar' means any hawker, pedlar, &c., who, without any horse or other beast bearing or drawing burden, travels and trades on foot, &c." A licensed hawker, on the other hand, may travel with horse or cart. But if a pedlar travels with a horse, he is out of the protection of his licence. Thus treating s. 13 of the Markets and Fairs Clauses Act as altered by s. 6 of the Pedlars Act, I should read in the words, "and acting as such;" for I think the pedlar is protected only while acting as a licensed person, that is, within his district, and within the definition given in the Act of a pedlar.

Judgment for the respondent.

Attorneys for appellant: *Sharp & Ullithorne, for Bateson, Harrogate.*

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THE QUEEN *v.* SMITH.

April 22. *Justices of the Peace—Service of Summons "at last or most usual Place of Abode"—Proof that Summons was duly served upon such Party a reasonable Time before the Time appointed for Appearance"*—11 & 12 *Vict. c.* 43, *ss.* 1 *and* 2.

By s. 1 of 11 & 12 Vict. c. 43 . . . every summons shall be served . . . upon the person to whom it is directed by delivering it to him personally, or by leaving it with some person for him at his last or most usual place of abode: and the person who shall serve the same shall attend at the time and place, and before the justices in the summons mentioned, to depose, if necessary, to the service of the summons. . . . By s. 2 . . . if upon the day and at the place appointed for the appearance of the party so summoned he shall fail to appear in obedience to such summons, then, if it be proved upon oath or affirmation to the justices then present that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance, it shall be lawful for such justices to proceed ex parte to the hearing of such information, and to adjudicate thereon as fully and effectually as if such party had personally appeared in obedience to the summons.

The defendant was a fisherman, and went to sea in pursuit of his calling on the 9th of March. On the same day a summons for an assault was taken out against him, requiring him to appear to answer the charge upon the 12th. On that day, it having been proved that a summons was served on the defendant on the 10th, by leaving it with his mother at his usual place of abode, the justices convicted him in his absence. Upon the 9th of April, he returned from sea, and was arrested under the conviction:—

Held, that there was no evidence before the justices that a reasonable time had elapsed between the time of the service of the summons and the day for hearing the summons, and the justices had therefore no jurisdiction to convict.

Motion for a rule, calling on two justices for the borough of Southwold to shew cause why a writ of certiorari should not issue to remove into this court, for the purpose of being quashed, a conviction under their hands whereby William Smith was convicted for that he did assault and beat Joseph Hedington, then being a constable of the borough, he being then in the execution of his duty as such constable, and whereby they adjudged William Smith to be imprisoned for six months with hard labour.

Affidavits were sworn by both the justices and the defendant, and the following are the material matters therein contained. On the 6th of March, 1875, an assault was alleged to have been committed by Smith on a police constable, Hedington, at South-

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wold. Hedington laid an information before justices, and a summons was issued on the 9th, commanding Smith to appear before them at the borough of Southwold on the 12th of March. On the 10th of March, a duplicate summons was served on Smith by leaving it with Smith's mother at the house in which Smith usually resided. On the 12th, Smith did not appear in obedience to the summons, and on proof of the service of the summons as above, he was convicted by the justices of the alleged assault, and was sentenced to six months imprisonment. On the 9th of April he was arrested at Lowestoft under the conviction. On the morning of the 9th of March Smith had proceeded from Southwold to Lowestoft, to prosecute a fishing voyage upon which he was then engaged, and he on that day proceeded to sea, and had since then, until the 8th of April, been engaged fishing off the east coast, occasionally going into Lowestoft with the fish that he had caught. Smith denied that he had heard either directly or indirectly anything of the summons until after he had been sentenced to six months imprisonment, and he swore that he was at sea from the 9th until the 13th of March, when he went ashore at Lowestoft for a short time.

Wrenfordsley in support of the motion. The defendant has been condemned unheard, and is entitled to have the conviction quashed. The summons was served at the mother's residence on the 10th of March, and he was convicted on the 12th; he had gone away to sea on the 9th, and never heard that a summons had been issued against him until after he had been sentenced. By s. 1 of 11 & 12 Vict. c. 43 (1), service of a summons may be effected in

(1) By s. 1 of 11 & 12 Vict. c. 43, "In all cases where an information shall be laid before justices of the peace for any county . . . borough . . . within England . . . that any person has committed . . . any offence or act within the jurisdiction of such justices for which he is liable by law, upon a summary conviction for the same before justices, to be imprisoned, fined, or otherwise punished; . . . it shall be lawful for such justices to issue their summons directed to such person, stating shortly the matter of such information . . . and requiring him to appear at a certain time and place before the same justices, or before such other justices of the county . . . borough as shall be there to answer to the said information . . . and every such summons shall be served by a constable . . . or other person to whom the same shall be delivered, upon the person to whom it is so

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one of two modes: by delivering it to the party personally or by leaving it with some person for him at his last or most usual place of abode; and by s. 2, if it be proved to the justices that the summons was duly served upon the party a reasonable time before the time appointed for his appearance, it shall be lawful for the justices to proceed ex parte. Here there is no proof whatever that the summons was duly served on Smith a reasonable time before the hearing. The only evidence before the justices was that the summons was left at his mother's residence on the 10th for Smith to appear on the 12th before the justices: that

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directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode: and the constable or person . . . who shall serve the same in manner aforesaid shall attend at the time and place and before the justices in the said summons mentioned to depose, if necessary, to the service of the said summons." . . . By s. 2, "if the person so served with a summons as aforesaid shall not be and appear before the justices at the time and place mentioned in such summons, and it shall be made to appear to such justices by oath or affirmation that such summons was so served what shall be deemed by such justices to be a reasonable time before the time therein appointed for appearing to the same, then it shall be lawful for such justices, if they think fit, upon oath or affirmation being made before them substantiating the matter of such information to their satisfaction, to issue their warrant to apprehend the party so summoned, and to bring him before the same justices, or before some other justices of the peace in and for the same county . . . or borough, to answer to the said information, and to be further dealt with according to law; or upon such information being laid as aforesaid for any offence punishable on conviction, the justices before whom such information shall have been laid may, if they shall think fit, upon oath or affirmation being made before them substantiating the matter of such information to their satisfaction, instead of issuing such summons as aforesaid, issue in the first instance their warrant for apprehending the person against whom such information shall so have been laid, and bringing him before the same justices or before some other justices . . . to answer the said information, and to be further dealt with according to law; or if, where a summons shall be so issued as aforesaid, and upon the day and at the place appointed in and by the said summons for the appearance of the party so summoned, such party shall fail to appear accordingly in obedience to such summons, then and in every such case, if it be proved upon oath or affirmation to the justices then present that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance as aforesaid, it shall be lawful for such justices to proceed ex parte to the hearing of such information, and to adjudicate thereon as fully and effectually to all intents and purposes as if such party had personally appeared before them in obedience to the said summons."

cannot be due service of a summons a reasonable time before the hearing when a man is absent from the country. In the case of *In re Williams* (1) Erle, J., said, as a general rule, service at nine o'clock in the morning of one day to appear at eleven in the morning of the next day was a reasonable service, but in that case the summons reached the defendant; here it never reached him, and he was convicted unheard.

F. Turner shewed cause in the first instance. The justices acted as required by ss. 1 and 2 of 11 & 12 Vict. c. 43. By s. 1 service of a summons may be effected by leaving the same with some person for the defendant at his last or most usual place of abode, and by s. 2, if it be found upon oath that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance, it shall be lawful for the justices to proceed ex parte to the hearing of the information. Here the justices had evidence that a duplicate summons was served on the defendant by leaving it with his mother at the house in which he usually resided; this evidence primâ facie gave the justices jurisdiction: *Reg.* v. *Evans* (2); and they are the judges whether the summons was served within a reasonable time before the hearing: *In re Williams.* (1)

[COCKBURN, C.J. We cannot control the judgment of the justices if there is some evidence before them; here there were no facts before them to form any opinion.]

The justices had evidence before them that the summons was served on the 10th, at the defendant's usual place of abode, to appear before them on the 12th of March; and they inferred that it had been served a reasonable time before the hearing; they acted bonâ fide and within their jurisdiction, and the conviction is valid.

Wrenfordsley, was not called upon to reply.

COCKBURN, C.J. To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure by issuing a warrant to apprehend him. Justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong ground for believing that the

(1) 21 L. J. (M.C.) 46. (2) 19 L. J. (M.C.) 151.

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summons has reached him, and that he is wilfully disobeying it. In this case, upon the affidavits, it is clear that the defendant did not, at the time of his conviction, know of the summons having been served at his mother's house. The assault is alleged to have been committed on the 6th of March; he went away to sea on the 9th; on the same day the summons was issued; and on the 10th it was left at his mother's house; but it does not appear that she was informed what her son was thereby required to do; if she had been informed of its purport she probably would have stated that her son was at sea. The justices convicted the defendant upon the 12th, he returned upon the 9th of April, and was then arrested under the conviction. The latter part of s. 2 provides, that when the party summoned fails to appear according to its exigency, then if it be proved that such summons was duly served upon such party a reasonable time before the time appointed for his appearance, it shall be lawful for the justices to proceed ex parte to the hearing of this complaint. But before exercising this power, it should have been shewn to the justices that the facts were such, and that the interval between leaving the summons at the defendant's place of abode and the time appointed for his appearance was such as to lead to the conclusion that the summons must have reached the defendant. The defendant was convicted in his absence while pursuing his calling as a fisherman; and the justices seem to have assumed he was at his mother's house at the time the summons was served; but as he is a fisherman they might have recollected that he might well be absent, engaged in his calling. The question, whether a reasonable time had elapsed between the service of the summons and the day at which the defendant was required to appear, was not brought to the attention of the justices, and under the circumstances, there was no evidence upon which they could find that a reasonable time had elapsed, they therefore acted without jurisdiction. The rule must be made absolute.

MELLOR, J. It would be monstrous if, under circumstances like these, a man could be convicted when the summons was never brought to his notice. I think when we take all the circumstances of this case into consideration, there was no evidence before the jus-

tices to enable them to come to the conclusion that the summons had been duly served upon the defendant, who was a fisherman.

QUAIN, J. I decide this case upon the ground that the summons was not duly served within s. 2. There are two modes of service pointed out by s. 1, and if the service be otherwise than personal the nature of the summons must be explained to the person with whom it is left, and he must be told what it requires. There is no proof that the mother was told that the summons was for her son, and there was no due service of the summons.

Rule absolute.

Attorney for prosecution: *W. Hammond, for J. R. Gooding, Southwold.*

Attorney for defendant: *A. Storey, for Archer, Southwold.*

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ADVICE NOTE OF GOODS—*Railway Company—Carriers—Warehousemen—We hold "not as Common Carriers, but as Warehousemen, at Owner's sole Risk, and subject to usual Warehouse Charges."*] The plaintiff was consignee of some flax sent by the defendants' railway to N. station. On its arrival at N. station, defendants sent to plaintiff an advice-note of its arrival, requiring him to remove it, and stating that they, defendants, would hold it "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges."—Soon after the receipt of this notice, the plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, and the flax remained on open ground insufficiently covered, and became damaged by wet.—In an action for the damage it was admitted that, if the defendants were bound to take reasonable care of the flax, they had not done so:—*Held*, that, treating the advice-note acquiesced in by the plaintiff as a contract, the terms of it, taken altogether, did not exempt the defendants from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and they were therefore liable for the damage. MITCHELL *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - 256

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APPRENTICE—*Master and Apprentice—Independent Stipulations—Misconduct of Apprentice—Discharge of Master's Obligation to instruct.*] Declaration, that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea broker; and in consideration of 200*l.*, to teach him such business and pay him a salary, provided that he should obey all commands and give his services entirely to the business during office hours: Breach, that the defendant dismissed the son from his service. Plea: that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours without just cause, wherefore the defendant discharged him:—*Held*, on demurrer, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good. WESTWICK *v.* THEODOR - - - 224

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ARTICLED CLERK—*Attorney and Solicitor—Notice of Application for Admission as Attorney—Rule 5 of Reg. Gen.* (*Attorneys*), *Hil. T.*, 1853.] C., an articled clerk, having duly served his five years, gave notice before Michaelmas Term, 1874, of his intention to apply to pass his final examination in Hilary Term, 1875; but he purposely abstained from giving notice of his intention to apply for admission as an attorney, because negotiations were pending as to a clerkship, one of the conditions proposed being that he should not apply to be admitted during this service. These negotiations went off, and C. was afterwards offered an advantageous clerkship, provided he

ARTICLED CLERK—*continued.*
were admitted in Hilary Term. C. accordingly applied to the Court on the first day of Hilary Term, that the one term's notice required by Rule 5 of Reg. Gen. (Attorneys), Hil. T., 1853, might be dispensed with, and that he might be admitted an attorney on the last day of the present term :—The Court refused the application. Ex parte John Cumberland - - - - - - 138

2. —— *Attorney and Solicitor — Continuous Services under Articles—Assignment of Articles 6 & 7 Vict. c.* 73, *ss.* 6, 12.] In September, 1870, A. was articled to his father, an attorney, for five years, and served to October, 1873, when the father, by an indenture of assignment, assigned all the service he had in A. to D., an attorney, for fifteen months, and A. served D. up to the expiration of that period, when he returned to his father and served him under the original articles for the remainder of the five years :—*Held*, that the service under the assignment to D. could not be reckoned as part of the period of five years service required by 6 & 7 Vict. c. 73, ss. 6, 12. Ex parte Adams - - - - - - - 227

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ASSENT OF EXECUTOR—*Will—Direction to Executors to receive and pay Rents to H. for Life, with direct Remainder over — Bequest — Legal Estate—Assent to Bequest in Remainder.*] A testator made the following will: "Subject to my debts, I bequeath to my wife the clear rentals of my two (leasehold) houses, Nos. 17 & 19, P. Street, for her life, to be paid to her every month; and after her decease I leave No. 17 (and other property) to my son R.; and I direct that the rents shall be received and the property be under the management of my executors. After R.'s decease I direct his share of the property be equally divided between his children; but, should he die without leaving lawful issue, I direct the same to be equally divided amongst the surviving children of my daughter M. A. C. I appoint my son-in-law J. C. and his wife M. A. C. my executors."—The executors proved the will, and collected the rents of the property, and paid the rents of No. 17 to the widow during her life, and, after her death, to R., who died without leaving issue :—*Held*, 1. That the assent of the executors to the life estates was an assent to the bequest in remainder. —2. That, though there was no direct bequest, the executors took the legal estate in No. 17 as trustees, but only to the extent of the trust; and that after the death of R. the legal estate became vested in the surviving children of M. A. C. Stevenson *v.* Mayor of Liverpool - 81

ASSESSMENT TO LIGHTING RATE—*Lighting and Watching Rate—Railway—*3 *& 4 Wm. c.* 90, *s.* 33—"*Houses, Buildings, and Property other than Land*"—"*Land.*"] By 3 & 4 Wm. 4, c. 90, s. 33, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of this Act (watching and lighting) :—*Held*, that a line of railway was "land" within the meaning of the section; and was therefore only rateable at the lower rate.—

ASSESSMENT TO LIGHTING RATE—*continued.* *Reg.* v. *Neath* (Law Rep. 6 Q. B. 707) followed.—*Peto* v. *West Ham* (2 E. & E. 144; 28 L. J. (M.C.) 240) discussed. The Queen *v.* Midland Railway Company - - - - - - 389

ASSESSMENT TO POOR-RATE—*Poor-rate—Rateability of Premises occupied as a Certified Industrial School under* 29 *&* 30 *Vict. c.* 118.] Premises occupied as a school, the managers of which have received a certificate under 29 & 30 Vict. c. 118, s. 7, constituting it a "certified industrial school," are liable to be rated to the poor rate. The Queen *v.* Overseers of West Derby - 283

2. —— *Rateability of Surface Land occupied by Buildings connected with Mines—Title under which the Occupier holds immaterial.*] The owners granted, for twenty-one years, to certain grantees full liberty, licence, and power to dig shafts, &c., and work and raise, and make saleable and sell, the minerals under certain limits, and to erect within the limits such sheds and other buildings as should be necessary for the above purposes. A cost-book mine company was established under the above grant, and certain buildings, machinery, tramways, &c., were erected on part of the surface within the limits :—*Held*, that it was immaterial what title, if any, was conferred by the above grant; the partners in the company were, by their servants and agents, the sole occupiers of that part of the surface on which the buildings, &c., were erected, and were rateable to the poor-rate in respect of such occupation.—*Guest* v. *East Dean* (Law Rep. 7 Q. B. 334) explained. Kittow *v.* Guardians of Liskeard Union - - 7

3. —— *Exclusive Occupation—Licence or Demise—Replevin.*] The plaintiffs, a railway company, were the owners of some stables situate within the gates shutting in their station premises from the public roads. By the permission of the plaintiffs, the stables were used by coal-owners under agreements, by which the coal-owners, "in consideration of the railway company permitting us to occupy and use a stable for four horses, do hereby agree to pay the monthly rent or sum of *l. s.* : and so long as we shall occupy and use the stables we agree to observe and be bound by the bye-laws which shall for the time being be issued by the company for the government of their railway stations, premises, and conveniences; and we undertake to deliver up possession of the stable at the expiration of one month after a notice in writing from the agent of the company, to be given at any time." The plaintiffs had not in fact exercised any control over or used any of the stables during the currency of the agreements; and none of the bye-laws had any application to the stables. The plaintiffs having been rated to the poor-rate in respect of the stables :—*Held*, that the plaintiffs were rightly rated as occupiers; for that, on the true construction of the agreement, looking at the situation of the stables, it was the intention of the plaintiffs to retain control over the stables, and not to part with the exclusive occupation to the coal-owners.—*Semble*, that, where one assessment is made in respect of property of which part is occupied and part is not occupied by the person rated, the question can be raised in replevin. London and North Western Railway Company *v.* Buckmaster - - 70

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4. —— *Construction of Agreement—Exclusive Occupation—Licence or Demise.*] The plaintiffs, a railway company, were the owners of some stables situate within the fence of the station, to which access was obtained through two gateways from the public roads. By the permission of the plaintiffs, the stables were used by coal-owners, under agreements by which the coal-owners, "in consideration of the railway company permitting us to occupy and use a stable for four horses, do hereby agree to pay the monthly rent or sum of 1*l.* 5*s.*, without any deduction whatsoever (property tax only excepted); and we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the railway company for the government and use of their railway stations, premises, and conveniences; and we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose, signed by any agent of the company, to be given at any time, shall be served on us, our executors or administrators, either personally or by being affixed to any part of the stable, provided that in such case a proportionate part only of the rent for the current month shall be paid." The plaintiffs had not in fact exercised any control over or used any of the stables during the currency of the agreements: and none of the bye-laws had any application to the stables. The plaintiffs having been rated to the poor-rate in respect of the stables:—*Held* (by Lord Coleridge, C.J., and Pollock and Amphlett, BB.), affirming the judgment of the Queen's Bench, that the plaintiffs were rightly rated as occupiers: for that, on the true construction of the agreement, looking at the situation of the stables, it was the intention of the plaintiffs to retain control over the stables, and not to part with the exclusive occupation to the coal-owners; (Cleasby, B., and Grove and Denman, JJ., being of a contrary opinion). London and North Western Railway Company *v.* Buckmaster - Ex. Ch. 444

5. —— *Shifting Occupation of Land—Quarterly Rate—Working of Coprolites.*] On an appeal by B. against a poor-rate for the parish of W., made in April, 1872, for the quarter ending the 24th of June, 1872 (the rates in W. being made quarterly), it appeared that, by an agreement, made in 1863, between A., the owner of lands in the parish of W. having coprolites in them, and B., A. authorizes B. to the exclusion of all other persons, to enter upon, hold, and use such lands for the purpose of digging, raising, and carting away the coprolites upon certain conditions:—B. consents to pay 11*l.* for every acre, and to dig such fields as shall be set out from time to time by A.'s agent, and to dig sufficient land to realise and pay to A. 1000*l.* a year at the least, payable quarterly; and in case of not digging sufficient, B. is nevertheless to pay 1000*l.* per annum. B. undertakes to restore the surface soil and level the land after the coprolites have been dug out. In accordance with the agreement, B. digs ten acres at the least every year, at an average of two and a half acres per quarter. He is in possession

ASSESSMENT TO POOR-RATE—*continued.*

of ten acres during at least one whole year, but of these ten acres only about one fourth is dug over and exhausted in each quarter, and one acre at least is always occupied by him for mills and tramways. Three acres and a half is the greatest quantity used by him at any one time for coprolite purposes, including mills, &c., and of the ten acres six acres and a half, from which the coprolites have been raised, are always lying unproductive. He is not necessarily in the occupation of the same ten acres during all the year, nor during the whole of any quarter, as his occupation is perpetually shifting, and he is taking on, from time to time, and yard by yard, fresh land at one end of his occupation and relinquishing it as and when levelled at the other end. The value of the occupation by B. of each acre of land for the purpose of raising coprolites is 11*l.*, and an hypothetical yearly tenant would give that for it. This value is realisable once only. The period from the time the coprolites are raised from any land until the land is levelled and restored by B. to the agricultural tenant varies from one to two years, but is never less than one year. After the coprolites have been removed until the land is so restored the occupation is valueless:—*Held*, (by Mellor, Lush, and Archibald, JJ.; Cockburn, C.J., dissenting), that B. ought to be rated in each quarterly rate in respect of ten acres at their enhanced or coprolite value. The Queen *v.* Overseers of Whaddon - - - 230

6. —— *Construction of s.* 19 *of Poor-rate Assessment and Collection Act*, 1869 (32 *&* 33 *Vict. c.* 41)—*Occupation as Tenant.*] S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house was vacant the owners would call upon a married man to go into it; if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work. The employers of S. did not compound for their rates under 32 & 33 Vict. c. 41, but paid upon the full amount, and were rated to the poor as occupiers of the houses. The overseers of the township in which S.'s house was situate were summoned before justices for that they had negligently omitted to enter the name of S. in the occupier's column of the rate-book, contrary to 32 & 33 Vict. c. 41, s. 19:—*Held*, 1. Upon the authority of *Hughes* v. *Overseers of Chatham* (5 M. & G. 54), that the occupation by S. was not that of a servant, but that of a tenant. 2. That s. 19 of 32 & 33 Vict. c. 41, was not confined to the cases mentioned in ss. 3 and 4, but was of general application, and that S. was entitled to have his

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name entered in the occupier's column of the rate-book.—*Cross* v. *Alsop* (Law Rep. 6 C. P. 315) commented upon. Smith *v.* Overseers of Seghill - - - - - 422

ASSESSMENT TO SANITARY RATE—*Public Health Act*, 1872 (35 *&* 36 *Vict. c.* 79), *s.* 43—*Rate for sanitary Purposes—Limit of Rate under local Act.*] By s. 230 of 4 & 5 Vict. c. lxx., a local Act for the town of W., in order to raise money to pay interest of money to be borrowed, and for carrying out the purposes of the Act, the commissioners are empowered to make a rate "upon the several owners, proprietors, lessees, and occupiers of all houses, mills, shops, warehouses, coach-houses, stables, cellars, buildings, gardens, lands, tenements, hereditaments, and premises whatsoever within the limits of the Act . . . so as such rates do not exceed in any one year the sum of 2*s.* 6*d.* in the pound." By s. 234 no person shall be rated on account of any arable, meadow, or pasture land exceeding two acres, excepting as is specially provided for in the Act, or of the farmhouses and buildings used exclusively for farming purposes.—By s. 16 of the Public Health Act, 1872 (35 & 36 Vict. c. 79), all expenses incurred or payable by an urban sanitary authority, under the Sanitary Acts shall, . . . if the Local Government Acts were not in force at or immediately before the passing of this Act, be defrayed . . . in the case of improvement commissioners out of any rate, in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district. By s. 43 any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes.—The Local Government Acts were not in force in the town of W. before the passing of the Public Health Act, 1872. The plaintiffs, as the urban sanitary authority for the town, under 4 & 5 Vict. c. lxx., and the Public Health Act, 1872, levied a rate at 1*s.* 6*d.* in the pound upon all messuages, lands, tenements, and hereditaments throughout the town for the purposes of defraying the expenses of the urban sanitary authority:—*Held*, that "limit" in s. 43 of the Public Health Act, 1872, ought not to be construed to mean exemption; and that a rate could not be imposed on any one person on account of lands exceeding two acres, nor of farmhouses and buildings used exclusively for farm purposes. Commissioners for Improving the Town and Parish of Walton-on-the-Naze *v.* Walford - - 180

ASSIGNMENT OF POLICY—*Marine Insurance—Assignment after Interest of Assignee had ceased*—31 *&* 32 *Vict. c.* 86, *s.* 1—*Sold-note, Construction of.*] On the 24th of November, 1871, V. Brothers insured with defendants in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call and discharge in the U. K. to be named, including all risks of craft or lighters to and from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers and their assigns. The linseed was shipped under a bill of

ASSIGNMENT OF POLICY—*continued.*
lading, whereby it was to be delivered at a safe port in U. K. to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on the 17th of February, 1872, sold in London to plaintiffs the cargo of linseed; by the sold-note the seed was to be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in U. K. The bill of lading was indorsed to plaintiffs. On the 21st of February, plaintiffs named a safe floating port, and on the arrival of the brig at the port the cargo was landed by public lighters employed by plaintiffs; on the 28th of February one of the lighters was sunk off the plaintiffs' wharf, being a loss within the terms of the defendants' policy. The loss occurred when part only of the cargo had been discharged, and before plaintiffs had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to plaintiffs; and on the 17th of October V. Brothers indorsed on it an assignment to plaintiffs, and they brought an action upon it to recover for the loss of the seed in the lighter:—*Held*, that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and V. Brothers' interest ceased and the policy lapsed; and the subsequent assignment by V. Brothers to plaintiffs was, therefore, of no avail under 31 & 32 Vict. c. 86, s. 1. North of England Pure Oil-Cake Company *v.* Archangel Maritime Insurance Company - - 249

ATTACHMENT OF DEBTS—*Attachment of Debts—Debts between Judgment Creditor and Garnishee—Common Law Procedure Act*, 1854 (17 *&* 18 *Vict. c.* 125), *ss.* 61, 63.] Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 61, 63, where a debt due from the garnishee to the judgment debtor has been attached, the garnishee has no right to retain the amount of any debt due to him from the judgment creditor, and the judge must order execution to levy the whole amount due from the garnishee to the judgment debtor. Sampson *v.* Seaton and Beer Railway Company - - - - - 28

2. —— *Garnishee Order—Order for Payment—Accruing Debt—Order to pay when Due—Common Law Procedure Act*, 1854, *ss.* 61, 62.] Under s. 61 of the Common Law Procedure Act, 1854, an order may be made not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor. It is not necessary to wait till the debt has become actually payable before making the order for payment. Tapp *v.* Jones [591

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125), *ss.* 61, 62, 63—*Bankruptcy of Judgment Debtor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16—"*Secured Creditor.*"] A judgment creditor, who has obtained and served on the garnishee a garnishee order nisi, under s. 61 of the Common Law Procedure Act, 1854, before a petition for liquidation has been presented by the judgment debtor, is a creditor holding a security on the debtor's property within the meaning of s. 12 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71.)—*Ex parte Greenway* (Law Rep. 16 Eq. 619) dissented from. Lowe *v.* Blakemore - 485

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See Justices' Jurisdiction. 1.

BYE-LAW—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98) *s.* 34—*Local Board of Health—Bye-laws, Validity of.*] A local board of health made bye-laws, under s. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98): "6th. Every person intending to erect any new building shall give fourteen days' notice, to be delivered to the board's surveyor, or left at his house, with detail plans and sections, and any person who shall erect any new building without delivering such notice and plans and sections, or without having the plans, &c., approved by the board, shall be liable to a penalty of 40*s.* By bye-law 36, the board may cause to be altered or pulled down any work begun or done in contravention of the bye-laws:—*Held*, that the 6th bye-law was within the powers conferred by s. 34, and was reasonable, and therefore valid. *Young* v. *Edwards* (33 L.J. (M.C.) 227) and *Hattersley* v. *Burr* (4 H. & C. 523) discussed. Hall *v.* Nixon - - 152

CARRIER—Advice note—Liability - 256
See Advice Note of Goods.

—— Felony of servant - - - 569
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—— Passengers' luggage - - - 1
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CARRIER OF PASSENGERS—Damages - 111
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CARRIER OF PASSENGERS—*continued.*
—— Luggage - - - - - 1
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—— Negligence - - 212, 271, 298, 437
See Evidence of Negligence. 1, 2, 3, 4.

CARRIERS ACT—*Carrier of Goods—Felony of Servants—Evidence—Carriers Act*, 11 *Geo.* 4 & 1 *Wm.* 4, *c.* 68, *s.* 8.] The plaintiff delivered to the defendants, a railway company, a case of drawings, of greater value than 10*l.*, to be carried from C. to L. The defendants' servants at C. put it into a truck, which was shunted into a siding of easy access to the public. The case was stolen by some one at C. The plaintiff having sued to recover the value of the drawings, the defendants pleaded under the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), to which the plaintiff replied felony by the defendants' servants. At the trial the judge, on the authority of *Vaughton* v. *London & North Western Ry. Co.* (Law Rep. 9 Ex. 93), directed the jury that if the facts, in their opinion, were more consistent with the guilt of the defendants' servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendants' servants:—*Held*, a wrong direction: for that the greater probability that the goods were stolen by the defendants' servants merely arose from their having greater opportunity of committing the theft; and that this alone did not make out a primâ facie case that the felony had been committed by one of the defendants' servants. M'Queen *v.* Great Western Railway Company - - - - 569

CASES—*Borries* v. *Hutchinson* (18 C. B. (N.S.) 445) followed - - - 265
See Damages on Contract of Sale. 1.

—— *Cross* v. *Alsop* (Law Rep. 6 C. P. 315) commented upon - - - 422
See Assessment to Poor-rate. 6.

—— *Cullen* v. *Trimble* (Law Rep. 7 Q. B. 314) followed - - - - 544
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—— *Eastwood* v. *Miller* (Law Rep. 9 Q. B. 440) approved - - - - 102
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—— *Ex parte Greenway* (Law Rep. 16 Ex. 619) dissented from - - - 485
See Attachment of Debt. 3.

—— *Feather* v. *The Queen* (6 B. & S. 257) distinguished - - - - 130
See Infringement of Patent.

—— *Francesco* v. *Massey* (Law Rep. 8 Ex. 101) affirmed - - - Ex. Ch. 553
See Cesser of Charterer's Liability.

—— *Guest* v. *East Dean* (Law. Rep. 7 Q. B. 334) explained - - - - 7
See Assessment to Poor-rate. 2.

—— *Hatfield* v. *Mackenzie* (10 Ir. C. L. Rep. 289) discussed - - - - 66
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—— *Hattersley* v. *Burr* (4 H. & C. 523) discussed
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—— *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123) followed
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—— *Hudson* v. *Macrae* (4 B. & S. 585) followed *See* Justices' Jurisdiction. 1. [582
—— *Hughes* v. *Overseers of Chatham* (5 M. & G. 54) followed - - - - 422 *See* Assessment to Poor-rate. 6.
—— *Langley* v. *Hammond* (Law Rep. 3 Ex. 161) discussed - - - - 360 *See* "Ways now Occupied or Enjoyed."
—— *Peto* v. *West Ham* (2 E. & E. 144) discussed *See* Assessment to Lighting Rate. [389
—— *Reg.* v. *Neath* (Law Rep. 6 Q. B. 707) followed - - - - 389 *See* Assessment to Lighting Rate.
—— *Shaw* v. *Coffin* (14 C. B. (N.S.) 372) followed *See* Proviso for Re-entry. [302
—— *The Banker's Case* (14 How. St. Tr. 1) followed - - - - 31 *See* Petition of Right. 1.
—— *Turner* v. *Reynall* (14 C. B. (N.S.) 328) discussed - - - - 66 *See* Apothecary.
—— *Vaughton* v. *London & North Western Ry. Co.* (Law Rep. 9 Ex. 93) discussed 569 *See* Carriers Act.
—— *Young* v. *Edwards* (33 L. J. (M.C.) 227) discussed - - - - 152 *See* Bye-law.

CERTIFICATE OF JUSTICES—Stopping up highway - - - - - 46 *See* Stopping up Highway.

CERTIFICATE OF REGISTRATION—Apothecary *See* Apothecary. [66

CERTIFIED INDUSTRIAL SCHOOL—Poor-rate *See* Assessment to Poor-rate. 1. [283

CERTIORARI—*Prohibition by Statute—Prevention of Cruelty to Animals Act* (12 & 13 *Vict.* c. 92), *s.* 26.] By s. 26 of the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 22), "No conviction under the authority of this Act, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form, or be removed by certiorari or otherwise into any of Her Majesty's Superior Courts of Record";—*Held*, that this enactment precluded the Court from entertaining a case stated by justices for the opinion of the Court. The Queen *v.* Chantrell [587

CESSER OF CHARTERER'S LIABILITY—*Shipping — Charterparty — Condition that Charterer's Liability shall cease—Lien on Cargo for Demurrage.*] By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days demurrage to be allowed above the said days. Charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—*Held*, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. —*Francesco* v. *Massey* (Law Rep. 8 Ex. 101) affirmed.—*Quære*, whether the lien for "demurrage" would have extended to damages for detention beyond the demurrage days. Kish *v.* Cory [Ex. Ch. 553

CHARTERPARTY—Cesser of liability - 553 *See* Cesser of Charterer's Liability.
—— Construction—Lay days - - 346 *See* Lay Days.

CHEQUE—Effect of crossing - - - 291 *See* Crossed Cheque.

CLAIM OF RIGHT—Justices' jurisdiction - 582 *See* Justices' Jurisdiction. 1.

COAL MINE—Manager—Fellow servant - 62 *See* Negligence of Servant.

COAL MINES REGULATION ACT, 1872 - 62 *See* Negligence of Servant.

COMMISSIONERS—Order of - - 355 *See* Misdemeanor.

COMPOSITION—Joint debtors - Ex. Ch. 406 *See* Composition by Joint Debtors.

COMPOSITION BY JOINT DEBTORS—*Debtor and Creditor — Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), *ss.* 126 *and* 127—*Composition in Respect of Joint Debts no Satisfaction of a separate Debt.*] The plaintiffs, being the holders of a joint and several promissory note of the defendant and H., sued the defendant on the note. The defendant pleaded that the note was given by him and H. to the plaintiffs on account of a partnership debt; and that afterwards the defendant and H., as partners, being unable to pay their debts, instituted proceedings, which took place under ss. 126 and 127 of the Bankruptcy Act, 1869, according to the forms given in the schedule to the Act as provided by rule 252; and, thereupon, an extraordinary resolution of the creditors of the defendant and H. that a composition of 8*s.* 6*d.* in the pound, payable by instalments, should be accepted in satisfaction of the debts due from them to their creditors was passed; that the provisions of the composition became binding on the plaintiffs and on all the creditors of the defendant and H., and that the debts due to the plaintiffs and to all other creditors became and were satisfied within the meaning of ss. 126 and 127 of the Bankruptcy Act, 1869: *Held*, on demurrer, affirming the judgment of the Court below (by Brett and Archibald, JJ., and Pollock and Amphlett, BB.; Kelly, C.B., dissenting) that the acceptance of a composition on the joint debt under s. 126 was not a satisfaction of the defendant's separate liability, and, therefore, that the plea was bad. Simpson *v.* Henning - - - - Ex. Ch. 406

COMPROMISE AMONG JURY—New trial - 54 *See* Inadequacy of Damages.

COMPULSORY PILOTAGE — *Negligence — Master and Servant—Injury to Pilot.*] There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and an action will lie by the pilot against the shipowners for injuries, caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants. Smith *v.* Steele 125

2. —— *Merchant Shipping Act*, 1854 (17 & 18 *Vict.* c. 104), *ss.* 353, 370, 379; 6 *Geo.* 4, *c.* 125, *s.* 5 —"*Trinity House Outport District.*"] By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353, the employment of pilots shall continue compulsory in all districts where it was com-

COMPULSORY PILOTAGE—*continued.*
pulsory at the time the Act passed. By s. 379, ships (inter alia) employed in the coasting trade of the United Kingdom, when not carrying passengers, shall be exempted from compulsory pilotage in "the Trinity House outport districts," which, by s. 370, comprise "any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter."—By the Ipswich Dock Act, 1852 (15 Vict. c. cxvi.), s. 3, a former Act, by which special provision was made for the appointment of pilots in the port of Ipswich, is repealed, and s. 91 enacts, as to the appointment of sub-commissioners, for examining pilots, &c., in the words of s. 5 of 6 Geo. 4, c. 125, except that they are described as persons "resident within" the port of Ipswich, instead of "at":—*Held*, that s. 91 was not a "particular provision;" and that Ipswich was therefore a Trinity House outport district, and a coasting vessel not carrying passengers navigating that port was exempt from compulsory pilotage. HADGRAFT *v.* HEWITH - - 350

COMPUTATION OF TIME—Fraction of a day
See LAY DAYS. [346

CONDITION PRECEDENT—*Contract—Condition Precedent—Part Performance of Consideration.*] By an agreement between plaintiff and defendant of the 7th of September, 1867, after a statement of the weekly expenditure and profits of plaintiff's business as a printer and publisher of a newspaper, it was agreed that, in the event of the business being proved by the books kept by plaintiff to realize a clear profit of 7*l.* per week, as shewn by the above statement, defendant should pay plaintiff 50*l.* on the 24th of December, 1867, 50*l.* on the 24th of June, 100*l.* at Christmas, 1868, and 200*l.* within four years from the 25th of December, 1867. In consideration of the premises plaintiff agreed to sell to defendant all the plant and furniture on the premises, and the goodwill of the business, with all the earnings subsequent to the 30th of September, 1867, and the house and premises then occupied by plaintiff. —The defendant, on the 30th of September, 1867, entered into possession of the house, with the plant and furniture, and of the business, which he thenceforward carried on until he afterwards sold it. After the lapse of the four years, plaintiff brought an action for the instalments, and the defendant sought to set up as a defence that the business was not proved to be worth 7*l.* clear profit per week:—*Held*, that, assuming that this, if the contract had remained executory, would have been a condition precedent, yet the defendant, having had a substantial part of the consideration, could not now set up the non-performance as a defence. CARTER *v.* SCARGILL - 564

CONSIDERATION FOR CONTRACT—Failure of
See FRAUD. [491

—— Part performance - - - - 564
See CONDITION PRECEDENT.

CONSTABLE—Watchhouse—Corporation - 279
See WATCHHOUSE.

CONTAGIOUS DISEASES (ANIMALS) ACT, ss. 64, 109 - - - - - - 544
See JUSTICES' JURISDICTION. 2.

CONTRACT—Condition precedent - 564
See CONDITION PRECEDENT.

—— Damages—Petition of right - - 31
See PETITION OF RIGHT. 1.

—— Fraud on third persons - - 491
See FRAUD.

—— Illegality—Opening surface of road - 92
See ILLEGAL CONTRACT.

—— Principal and agent - - - - 57
See CONTRACT BY AGENT.

CONTRACT BY AGENT—*Principal and Agent—Proof by Creditor upon Estate of Insolvent Agent—Election to treat Agent as Debtor after undisclosed Principal discovered.*] The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor. B. purchased certain goods of the plaintiffs: he was the agent of the defendants, his undisclosed principals. B. became insolvent, and the plaintiffs then became aware that the defendants were principals. With this knowledge the plaintiffs' clerk sent an affidavit of proof of the debt due to them against the estate of B., whose affairs were being liquidated by arrangement. The plaintiffs endeavoured to prevent the affidavit of proof from being filed, but were unsuccessful:—*Held*, that the mere filing of the affidavit of proof formed no obstacle to the plaintiffs suing the defendants for the price of the goods sold to B. CURTIS *v.* WILLIAMSON - - - 57

CONTRACTOR—Damage from injury to land 453
See REMOTENESS OF DAMAGE.

CONVICTION—Prior bar to second - - 378
See PREVIOUS CONVICTION.

COPROLITES—Occupation of land—Poor-rate 230
See ASSESSMENT TO POOR-RATE. 5.

COPYHOLD—Custom to grant in reversion 310
See CUSTOM OF MANOR.

COVENANT—Proviso for re-entry - - 302
See PROVISO FOR RE-ENTRY.

CRIMINAL LUNATIC — *Inquiry as to the last legal Settlement of—By whom Inquiry to be made—3 & 4 Vict. c. 54, s. 2—27 & 28 Vict. c. 29, s. 2—The Prison Act*, 1865 (28 & 29 *Vict. c.* 126), *s.* 66.] By s. 1 of 3 & 4 Vict. c. 54: "If any person, while imprisoned in any prison under any sentence of death shall appear to be insane, it shall be lawful for any two justices of the peace of the county or place where such person is imprisoned to inquire into the sanity of such person." By s. 2: "In all such cases as aforesaid it shall be lawful for such two justices, or any other two justices of the peace of the county or place where such person is imprisoned, to inquire into and ascertain the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and make an order if necessary." By s. 1 of 27 & 28 Vict. c. 29, s. 1 of 3 & 4 Vict. c. 54 is repealed, and by s. 3 the secretary of state may himself direct an inquiry as to sanity, either from information by means of a certificate transmitted by two or more of the visiting justices of the prison in which such prisoner under sentence of

CRIMINAL LUNATIC—*continued.*

death is confined, or by any other means whatsoever. By s. 66 of 28 & 29 Vict. c. 126: "Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, and the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the prison authority shall, for all purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority."—The council of the borough of B., under s. 31 of the Prison Act, 1865 (28 & 29 Vict. c. 126), entered into a contract with the justices of the county of S. for the receipt and maintenance in the county gaol at L. of all prisoners maintainable at the expense of the borough of B. E. was committed to the gaol at L. under a warrant of a magistrate of B. to take her trial upon a charge of murder committed within the limits of the borough, and was afterwards found guilty and sentenced to death, and was received and maintained in the county prison at L. under the contract; and while she was so imprisoned she became insane:—*Held*, affirming the judgment of the Court of Queen's Bench, that the justices of S. were the justices to make the inquiry into the sanity, &c., of E. under s. 2 of 3 & 4 Vict. c. 54, as they were the justices of the county or place where L. was imprisoned; and that the gaol of L., though the prison of the council of B. within the meaning of s. 66 of 28 & 29 Vict. c. 126, could not be said to be within B.; and the justices of B. had therefore no jurisdiction. The Queen *v.* Visiting Justices of Lewes Prison - - - 106, Ex. Ch. 579

CROSSED CHEQUE—*Banker's Cheque, Effect of crossing with Name of Banker—Bonâ fide Holder for Value*—21 & 22 *Vict.* c. 79, *s.* 2.] A. being indebted to plaintiff, gave him a cheque for 21*l.*, payable to plaintiff's order, on the defendants, a banking company. Plaintiff having indorsed his name on the cheque, crossed it with the name of his bankers, "London and County Banking Company;" the cheque was stolen from plaintiff, and sold by the thief to B., for 8*l.* 10*s.*; B. passed it for full value to C., who took it bonâ fide, and afterwards paid it into his bankers, the London and Westminster Bank, and they presented it to the defendants, who paid it to them notwithstanding the crossing. The plaintiff brought an action against the defendants for so paying the cheque, and also for a conversion, relying on 21 & 22 Vict. c. 79, s. 2, which enacts, that a cheque on a banker, payable to order or bearer, and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the cheque, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:—*Held*, that the plaintiff could not recover against the defendants. The statute did not affect the negotiability of the cheque; the plaintiff had indorsed the cheque, so that C. became the bonâ fide holder of it for value before it was presented to

CROSSED CHEQUE—*continued.*

defendants, and plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants. Smith *v.* Union Bank of London - - - - 291

CRUELTY TO ANIMALS—Conviction—Certiorari
See Certiorari. [587

CUSTOM—Repair of road—Exemption - 469
See Repair of Road. 3.

CUSTOM OF MANOR—*Copyhold—Lord having only a temporary Estate—Qualified Right to grant Reversion.*] The manor of M. was appendant to a rectory, and by the custom of the manor the tenements might be granted for lives in possession and in reversion; by one of the customs it was declared that, "if any man have taken a reversion, and the lord die that granted the same, and the said reversion being out of possession, the next lord may lawfully set again":—*Held*, that the meaning of the custom was, that where a reversion happens not to have come into possession at the time of the death of the lord granting it, the succeeding lord may treat the reversion as a nullity and lease again, and that such custom was not unreasonable. The Queen *v.* Venn 310

DAMAGES—Carrier of passengers - - 111
See Damages against Carrier of Passengers.

—— Inadequacy—New trial - - 54
See Inadequacy of Damages.

—— Remoteness—Injury to land - - 453
See Remoteness of Damage.

—— Sale of goods - - - 265, 319
See Damages on Contract of Sale. 1, 2.

DAMAGES AGAINST CARRIER OF PASSENGERS—*Carrier of Passengers—Railway Company—Breach of Contract of Carriage—Measure of Damages.*] The plaintiff, with his wife, and two children of five and seven years old respectively, took tickets on the defendants' railway from Wimbledon to Hampton Court, by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night the plaintiff was unable to get a conveyance or accommodation at an inn. And the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance.—In an action to recover damages for the breach of contract, the jury gave 28*l.* damages: viz. 8*l.* for the inconvenience suffered by having to walk home; and 20*l.* for the wife's illness and its consequences:—*Held*, as to the 8*l.*, that the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the 20*l.*, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it. Hobbs and Wife *v.* The London and South Western Railway Company - - - - - - 111

DAMAGES ON CONTRACT OF SALE—*Contract, Breach of, in Delivery of Goods—Measure of Damages.*] The defendant contracted to supply to plaintiff 2000 pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October, defendant informed plaintiff that he would be unable to complete his contract by the time specified, on which plaintiff endeavoured to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his subvendee, procured 2000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the subvendee accepted, but paid no advance in price to plaintiff. The plaintiff sought to recover against defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. It was admitted at the trial that the shirtings which the plaintiff brought were the nearest in price and quality that could be got by the 20th of October; and the jury returned a verdict for the amount claimed:—*Held*, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price.—*Borries* v. *Hutchinson* (18 C. B. (N.S.) 445, 465), followed. Hinde *v.* Liddell - - - - 265

2. —— *Contract to deliver Goods to commence by the 15th of February, and to be completed by the 15th of May—Measure of Damages.*] The defendants entered into the following contract:—Sold to the plaintiff 5000 tons of iron rails at 11*l.* 5*s.* per ton, delivered f. o. b., Newport, the delivery to commence by the 15th of January, and to be completed by the 15th of May. In the event of the defendants exceeding the time of delivery they shall pay by way of fine 7*s.* 6*d.* per ton per week. In the event of ships not being ready within fourteen days, notice being given, then payment to be made against wharf warrants for each 500 tons stacked and being to buyer's order. The defendants made default in the delivery of the iron, which was delivered during the months of May, June, July, August, and completed in September:—*Held*, that the fine to be paid for delay in delivery ought to be calculated from the time at which the contract was to be completed, viz. the 15th of May. Bergheim *v.* The Blaenavon Iron and Steel Company, Limited - - 319

"DEATH, LEAVING NO ISSUE"—*Will, Construction of—"Leaving no Issue" read "having had no Issue."*] The testatrix by her will gave her estate real and personal unto M. H. for her sole use during her life, and after her death to her children in equal parts; and in case M. H. dies leaving no issue, the whole of the property to go to the next of kin:—*Held*, affirming the judgment of the Queen's Bench, that the words "leaving no issue" must be construed "having had no issue." Treharne *v.* Layton - - Ex. Ch. 459

DEDUCTION FROM WAGES—*Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 3—*

DEDUCTION FROM WAGES—*continued.*

Deduction of Fines from Wages.] By s. 3 of the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), "If any employer . . . shall deduct directly or indirectly from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, or shall refuse or neglect to pay the same, or any part thereof, in the current coin of the realm, he shall forfeit 5*l.* for every offence."—The plaintiff was in the employment of the defendants, who were hosiery manufacturers, as a hand-frame worker. By the regulations of the factory he was liable to a fine of 8*d.* a day for staying away from work without permission. The plaintiff had been fined for so absenting himself, and the amount was deducted by the defendants from his wages:—*Held*, that the deduction of fines from wages was not within s. 3; and the defendants were not liable to a penalty. Willis *v.* Thorp - 383

DEFECTIVE GRATING—Local Board - 219
See Nuisance in Highway.

DEMURRAGE—Lay days—Compensation 346
See Lay Days.

—— Lien—Charterparty - - - 553
See Cesser of Charterer's Liability.

DESERTION BY HUSBAND—Protection order
See Protection Order. [147

DISCOVERY—Documents—Petition of right 44
See Petition of Right. 2.

DOCUMENTS—Discovery—Petition of right 44
See Petition of Right. 2.

DRAIN—Grant of - - - - 188
See Sewer.

EASEMENT—Grant of Drain - - 188
See Sewer.

—— Way—Grant of - - - - 360
See "Ways now occupied or enjoyed."

ENLARGEMENT OF TIME—Bill of exchange—Foreign law - - - - 525
See Indorsement of Bill of Exchange.

"ENTERTAINMENT" - - - 594
See Refreshment House.

EPPING FOREST—Order of commissioners 355
See Misdemeanor.

EVIDENCE—Carrier—Felony of servant - 569
See Carriers Act.

—— Custom—Repair of road - - 469
See Repair of Road. 3.

—— Loss of luggage - - - - 1
See Passengers' Luggage.

—— Negligence - - 212, 271, 288, 437
See Evidence of Negligence. 1, 2, 3, 4.

EVIDENCE OF NEGLIGENCE—*Railway Company—Duty to Passenger on alighting from Train—Substitute for Platform—Negligence.*] Where a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the pas-

EVIDENCE OF NEGLIGENCE—*continued.*

senger in alighting.—Plaintiff, a female, was a passenger by defendants' railway to B., a very small station; on the arrival of the train at the station, the engine and part of the carriage in which plaintiff was riding, were driven past the end of the platform, which is short, and came to a standstill; the door of the plaintiff's compartment being beyond the end of the platform. Upon the train stopping, plaintiff rose and opened the door, and stepped on to the iron step; she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavouring to get the other foot on to the footboard she lost her hold of the carriage-door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff:—*Held*, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform.—*Held*, secondly, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff. Robson *v.* The North Eastern Railway Company - - - - 271

2. —— *Negligence—Master and Servant—Licensee—Railway Company, Duty of, towards Customer assisting Railway Servants in delivering his Goods.*] The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to P. station. On the arrival of the train at the station, there being only one porter available to shunt the horse-box to the siding from which alone the heifer could be delivered to the plaintiff, he was allowed, in order to save delay, to assist in shunting the horse-box, and while he was so assisting he was run against and injured by a train which was negligently allowed to come out of the siding. There was evidence from which the jury might find that the plaintiff was assisting in the shunting with the assent of the station-master:—*Held*, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his heifer; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes* v. *North Eastern Ry. Co.* (Law Rep. 4 Ex. 254; Law Rep. 6 Ex. 123). Wright *v.* The London and North Western Railway Company - - 298

3. —— *Railway Company—Carrier of Passengers—Passenger travelling free at his own Risk—Negligence.*] The plaintiff travelled by the defendants' railway from L. to G. as a drover with cattle, without payment, on the condition, which he knew, that he travelled at his own risk. On the train arriving at G. it stopped on a bridge over a river; the parapet of the bridge was very low and dangerous, and the night dark. The plaintiff got out of the train, and in walking along the railway from the spot where the train stopped to go off the defendants' premises, fell over the parapet of the bridge and was injured:—*Held*, that the terms under which the plaintiff travelled exempted the defendants from liability, not only during the actual transit on the railway, but whilst the plaintiff was going from the defendants' premises. Gallin *v.* London and North Western Railway Company - 212

4. —— *Railway Company—Non-liability of Company where a Person travels "at his own Risk" over their Line under a Contract with another Company.*] Plaintiff was a person in charge of sheep, which were sent from Angerton in Scotland to Newcastle, under a note or ticket, issued by the North British Railway Company, which contained the following: "78 sheep from Angerton to Newcastle, N.E. If it is desired that any drover or person accompanying the live stock shall be allowed to travel in the same train as the live stock without paying a fare, he must travel at his own risk, and must either sign this, in token that he agrees to travel at his own risk, or he must pay fare as a passenger: I agree to travel at my own risk without paying any fare, and accept a free pass, subject to the following conditions: . . . . That the holder is subject to the bye-laws of the company, and he exonerates the company from all responsibility for injury or loss to himself, howsoever occasioned, on the journey for which it is issued or used." There was a place for the signature of the drover at the bottom; the plaintiff did not sign it; but he travelled by the same train as the sheep without paying any fare. The North British Railway goes no farther than Morpeth, and the sheep and plaintiff were carried on in the same trucks and carriage, attached to a train of defendants, the North Eastern Railway Company, on defendants' line to Newcastle, under arrangements between the two companies. After the train left Morpeth it was run into by another train of defendants, owing to the negligence of defendants' servants in charge of that other train, and plaintiff was injured:—*Held*, that the ticket under which plaintiff travelled meant that he should be at his own risk during the whole of the journey; and it extended to protect defendants just in the same way as it protected the North British Company from all liability for the consequences of any risk connected with the train or line of railway. Hall *v.* North Eastern Railway Company - 437

EXECUTOR—Assent to bequest - - 81
See Assent of Executor.

EXEMPTION FROM LIABILITY TO REPAIR—Custom . - - - - 469
See Repair of Road. 3.

FABRICATION OF VOTING PAPER—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 13, *subs.* 5—*Mens rea.*] At an election of a member of a local board of health, a voting paper (form sch. A. to 11 & 12 Vict. c. 63) was delivered at the house of E. R., a voter; the wife of the voter, having her husband's authority, put a cross at the bottom of the paper, and the respondent then put E. R., the voter's initials, in the margin opposite the name of the candidate for which the vote was intended, and the respondent signed his name as witness to the mark of the voter. An information having been laid against the respondent under 21 & 22 Vict. c. 98, s. 13, subs. 5, for "fabricating" the voting paper; the justices dismissed the summons, finding, on the above facts, that the respondent bonâ fide believed (as the fact was) that the wife had authority to put her husband's name to the paper, and that the respondent had no criminal or unlawful intention in putting his name as witnessing the mark of the voter:—*Held*, that the justices were right: for that mens rea was necessary to constitute the offence. Aberdare Local Board of Health *v.* Hammett - 162

FAILURE OF CONSIDERATION—Fraud - 491
See Fraud.

FELLOW-SERVANT—Negligence - 62
See Negligence of Servant.

FELONY OF SERVANT—Carrier - - 569
See Carriers' Act.

FIRE ENGINE—*The Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 33—"*Owner of Lands and Buildings*"—*Expenses incurred for the use of Fire Engine.*] By s. 33 of the "Town Police Clauses Act, 1847" (10 & 11 Vict. c. 89), the commissioners may send engines with their appurtenances and firemen beyond the limits of the special Act for extinguishing fire in the neighbourhood of the limits: and the owner of the lands and buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, &c.:—*Held*, that the occupier was the owner of lands within the meaning of the above section, and liable for the expenses incurred in sending an engine to extinguish a fire at a haystack belonging to him. Lewis *v.* Arnold - - - 245

FISHING—Claim of right - - - 582
See Justices' Jurisdiction. 1.

FOREIGN BILL—Indorsement in England 525
See Indorsement of Bill of Exchange.

FOREIGN LAW—Bill of exchange—Indorsement - - - - - 525
See Indorsement of Bill of Exchange.

—— Lex loci contractus - - - 276
See Lex loci contractus.

FRACTION OF DAY—Computation of lay days
See Lay Days. [346

FRAUD—*Action for Breach of Contract—Failure of Consideration—Money had and received.*] The defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to the plaintiff for 15,000*l.* the sole and exclusive right to use and exercise the patent in B. The plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The directors of the defendants' company were not aware that the patent for B. had not been obtained. The object of the plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company, under the belief that, if the company bought of the plaintiff the right sold to him by the defendants, the company would be entitled to the exclusive use of the process in B. The plaintiff sued the defendants to recover back his 15,000*l.*, on the ground that, as there was no exclusive right to the use of the process in B., the consideration had failed:—*Held*, that no action could be maintained.—1. On the ground that, although the defendants ostensibly sold the exclusive right to use the process at B., yet, the plaintiff's object being to float a company and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and that he had, in fact, obtained that for which he paid the 15,000*l.*;—2. On the ground that the plaintiff, being aware that no exclusive right to use the process in B. could be obtained, had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. Begbie *v.* The Phosphate Sewage Company, Limited - - 491

FRAUDS, STATUTE OF—29 *Car.* 2, *c.* 3, *s.* 17—*Sale of Goods—Memorandum in Writing—Variation by Seller in Performance of one of Terms—Ratification by Buyer.*] The defendant's son, H., junior, gave a verbal order in London on the 18th of February, 1870, to the plaintiffs to send three cases of leather-cloth to the defendant at Cologne; the plaintiffs had been in the habit of forwarding goods to the defendant through H. & P., Rotterdam, and H., junior, being informed that the port of Rotterdam was blocked with ice, directed that the three cases should be sent through Messrs. G., Ostend. When the plaintiffs had executed the order Rotterdam was again open, and Messrs. G. had given up their Ostend route. The plaintiffs therefore forwarded the three cases through H. & P., via Rotterdam; and on the same day, the 1st of March, they forwarded the invoice from the plaintiffs to the defendant, giving the price, &c., with a letter, in which they said: "Inclosed we hand you invoice of three cases leather-cloth. This order came through Mr. H., junior, who instructed us to send it through Messrs. G., Ostend, but as they have given up that route we have sent it through H. & P., Rotterdam, as before." The defendant received but did not answer this letter, but gave further orders for goods to the plaintiffs, which were forwarded via Rotterdam. The ship by which the three cases were sent was stranded and the goods damaged. On the 28th of June the plaintiffs wrote to the defendant, inclosing their statement of account, and requesting payment;

FRAUDS, STATUTE OF—*continued.*
and on the 5th of July defendant wrote to plaintiffs, acknowledging the receipt of the statement, and saying, "In looking over your statement I find you have charged me for goods which have been entirely lost in the sunk ship, being sent via Rotterdam. You state in your letter of March 1st that Mr. H., junior, instructed you to send the goods through Messrs. G., via Ostend, but on account of their having given up that route you sent, without any instructions, the goods via Rotterdam." Further correspondence ensued, and defendant having refused to pay for the three cases, an action was brought, and the above facts and correspondence appeared on the trial.—The judge ruled that there was sufficient memorandum in writing, signed by the defendant, of the contract; and left it to the jury to say, from the silence and subsequent conduct of defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam before the loss; and they found in the affirmative, and a verdict passed for the plaintiffs:—*Held*, that there was sufficient memorandum of the original contract; and that there was evidence from which the jury might find that the defendant had assented to the substituted performance in the change of route, which assent need not be in writing. The Leather-Cloth Company *v.* Hieronimus - - - - - 140

2. —— 29 *Car.* 2, *c.* 3, *s.* 4 — *Interest in Land—Collateral Agreement.*] Declaration that the plaintiff and defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage, together with the use of the furniture therein, and the plaintiff objected to become tenant on the ground that the messuage was in imperfect repair and insufficiently furnished; that the defendant, in order to induce, as he in fact did thereby induce, the defendant to become forthwith tenant to him of the messuage without requiring the defendant to do any repairs or sending additional furniture into the same previously to the creation of the tenancy, verbally promised the plaintiff that he would within a reasonable time after the creation of the tenancy do such repairs and send additional furniture into the messuage; and thereupon, afterwards in consideration that the plaintiff, at the request of the defendant, had so forthwith become tenant to the defendant of the messuage without requiring the defendant to do any such repairs or to send into the messuage any such additional furniture, the defendant promised the plaintiff that he would, within a reasonable time, do such repairs and send such additional furniture into the messuage. Averment of conditions precedent. Breach, that the defendant did not perform his last-mentioned promise:—*Held*, on demurrer, that the agreement declared on did not relate to an interest in land within s. 4 of the Statute of Frauds (29 Car. 2, c. 3); and an action could be maintained upon it though not in writing. Angell *v.* Duke - 174

—— Contract of service - - - - 97
See Master and Servant Act, 1867.

GAMING—*Betting House Act* (16 & 17 *Vict. c.* 119), *ss.* 1, 3—"*Place*"—"*Knowingly and wilfully permitting Place to be used for the Purpose of betting.*"] The appellant was charged on a summons under the Betting House Act (16 & 17 Vict. c. 119), ss. 1 and 3, with knowingly and wilfully permitting a place of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. On the hearing it was proved that the appellant occupied as tenant a house, with a piece of inclosed ground adjoining, used for cricket, foot-racing, and other games and sports. On the day named in the summons foot-racing took place in the grounds, to which persons were admitted on payment of 6*d*. Within the grounds, but outside the space reserved for the runners, and amongst the spectators, some fifteen or twenty professional bettors stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying 1*s*. each, and receiving a ticket. The evidence satisfied the magistrate that the appellant knew of what was going on and took no steps to prevent it, and that he might have prevented it if he had been so minded; and he accordingly convicted the appellant of the offence charged:—*Held*, that the conviction was right.—*Eastwood* v. *Miller* (Law Rep. 9 Q. B. 440) approved. Haigh *v.* The Town Council of Sheffield - - - - - 102

GARNISHEE ORDER—Attachment of debt 485, *See* Attachment of Debt. 2, 3. [591

—— Set-off - - - - - - 28
See Attachment of Debts. 1.

GAS COMPANY—Licence to open surface of road *See* Illegal Contract. [92

GASWORKS—*Gasworks Acts*, 1847, 1871 (10 *Vict. c.* 15; 34 & 35 *Vict. c.* 41, *ss.* 1, 3, 36)—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125, *s.* 2)—*Penalty for improperly cutting off Supply of Gas—Metropolitan Gas Company subject to Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41)—*Effect of Incorporation with a subsequent Act of an Act already incorporated with a previous Act.*] The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36, imposes a penalty whenever the undertakers neglect or refuse to supply gas to any occupier within the limits of the special Act under such pressure as is prescribed:—*Held*, that the section applied to a case where the gas company had improperly cut off the supply of gas.—By s. 2 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), the Gasworks Clauses Act, 1847 (10 Vict. c. 15), is incorporated with this Act, and made to apply to the several metropolitan gas companies enumerated; by s. 1 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), "the Gasworks Clauses Act, 1847, and this Act shall be construed together as one Act":—*Held*, that the Gasworks Clauses Act, 1871, applied to all the enumerated companies. The Commercial Gas Company *v.* Scott - 400

GASWORKS ACTS, 1847, 1871 - - 400
See Gasworks.

GENERAL WORDS—Right of way - 360
See "Ways now occupied or enjoyed."

GRANT OF EASEMENT—Way - - 360
See "Ways now occupied or enjoyed."

HAWKER—Pedlar's licence - - 598
See Pedlar.

HIGHWAY—Contract to break up surface—Illegality - - - - 92
See Illegal Contract.

—— Defective grating—Local board - 219
See Nuisance in Highway.

—— Exemption from liability to repair - 469
See Repair of Road. 3.

—— Paving expenses - - - 465
See Repair of Road. 2.

—— Repair—"Owners" - - Ex. Ch. 203
See Repair of Road. 1.

—— Stopping up—Certificate - - 46
See Stopping up Highway.

—— Surveyor's accounts—Illegal items - 86
See Surveyor's Accounts.

HIGHWAY BOARD—Opening surface of road 92
See Illegal Contract.

HOSIERY MANUFACTURER (WAGES) ACT, 1874
See Deduction from Wages. [383

HUSBAND AND WIFE—Protection order 147
See Protection Order.

ILLEGAL CONTRACT—*Highway Board—Licence to open Surface of Highway—Consideration.*] The plaintiffs, a highway board, agreed with the defendants, a gas company, that if the plaintiffs would give the defendants a licence to open a highway in their jurisdiction, the defendants should make good the surface of the road, and would pay to the plaintiffs 1*s.* per yard of the highway so broken up:—*Held*, that the contract was valid; for that the agreement of the plaintiffs to allow the defendants to interfere with the surface of the road was a good consideration, and the contract was not illegal and did not necessarily contemplate the creation of a nuisance by the defendants. The Edgeware Highway Board *v.* The Harrow District Gas Company - 92

—— Tunnel under road - - - 453
See Remoteness of Damage.

ILLEGALITY—Tunnel under road - - 453
See Remoteness of Damage.

INADEQUACY OF DAMAGES—*New Trial—Compromise amongst Jury—Slander.*] A new trial will be granted for inadequacy of damages in an action for slander where the smallness of the amount shews that the jury have made a compromise, and, instead of deciding the issues submitted to them, have agreed to find for the plaintiff for nominal damages only. Falvey *v.* Stanford - - - - - - 54

INCORPORATION OF ACT—Subsequent act 400
See Gasworks.

INDEPENDENT STIPULATIONS—Apprentice
See Apprentice. [224

INDORSEMENT OF BILL OF EXCHANGE—*Liability of Drawer or Indorser on Bill drawn or indorsed in one Country and payable in another—Enlargement of Time for Payment by ex post facto Law.*] The contract, which a party transferring for value the property in a bill of exchange makes with the transferee, is that he warrants that the bill, having been accepted by the drawee, shall, on being presented at the time it becomes due, be paid; that is, he engages as surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. The liability of the transferor, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be the obligations of the surety.—A bill of exchange was drawn and indorsed by the defendants in England upon French subjects resident in Paris, and was accepted by them in Paris. The bill on the face of it was payable on the 5th of October, 1870; before that date the Emperor of the French, in consequence of the war with Germany, enlarged the time for the payment and protesting of current bills of exchange for one month; and the time was afterwards enlarged from time to time by the government of France for the time being. By these enlargements of time the defendants' bill did not become payable till the 5th of September, 1871. On that day the bill was presented to the acceptors and payment refused; and it was duly protested, and due notice of dishonour, &c., given to all the parties:—*Held*, that the defendants were liable on the bill at the suit of their indorsee for value. Rouquette *v.* Overmann and Schou. [525

INDUSTRIAL SCHOOL—Poor-rate - - 283
See Assessment to Poor-rate. 1.

INFRINGEMENT OF PATENT—*Rights of the Crown.*] The plaintiff was the assignee of several letters patent for "Improvements in breach-loading firearms." The defendants, under a contract with the secretary of state for war, manufactured and delivered, according to the terms of the contract, certain rifles (which were accepted from the defendants by the secretary at war for the public service), and in so doing infringed the plaintiff's patent:—*Held*, that, the contract being for the sale of articles for the defendants' own profit, and not as manufacturers of them as servants of the Crown, the principle laid down in *Feather* v. *The Queen* (6 B. & S. 257; 35 L. J. (Q.B.) 200) did not apply, and the defendants were liable for the infringement. Dixon *v.* The London Small Arms Company, Limited - - - - 130

INNKEEPER—Lien—Piano - Ex. Ch. 210
See Lien of Innkeeper.

INSURANCE—Marine—Assignment of policy 249
See Assignment of Policy.

INTEREST—*Where Debt is Payable at "certain Time" under a Writing—3 & 4 Wm. 4, c. 42, s. 28.*] In order to entitle a creditor under s. 28 of 3 & 4 Wm. 4, c. 42, to interest on a debt from the time when the debt was payable, "if such debt be payable by virtue of some written instrument at a certain time," it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterwards.—Therefore, where plaintiff supplied furniture to defendants on the written terms, "one third in cash, and bills at six and twelve months for the balance":—*Held* (by Mellor and Lush, JJ.; Blackburn, J., dissenting), that the case was

INTEREST—*continued.*
within the section, and the plaintiff was entitled to interest on the one third from the time the goods were delivered. Duncome *v.* The Brighton Club and Norfolk Hotel Company - 371

INTEREST IN LANDS—Statute of Frauds 174
See Frauds, Statute of. 2.

INTERROGATORIES, COMMON LAW COURTS—*Libel—Criminating Interrogatories, as to the Authorship and Publication.*] In an action for libel, on an affidavit that the libel was in a printed handbill to which there was no printer's name, that the plaintiff could not ascertain who was the printer, and that the defendant had been seen with a person who affixed some of the handbills, and was also seen posting one himself, the Court allowed interrogatories to be administered to the defendant as to whether he had not been instrumental in printing and publishing the libel. Greenfield *v.* Reay - - - - 217

INVITATION TO ALIGHT—Railway Company
See Evidence of Negligence. 1. [271

ISSUE—Death, leaving no issue Ex. Ch. 459
See Death, leaving no Issue.

JOINT AND SEVERAL DEBT—Composition by joint debtors - Ex. Ch. 405
See Composition by Joint Debtors.

JOINT STOCK COMPANY—List of members 329
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JURISDICTION—Justices—Claim of right 582
See Justices' Jurisdiction. 1.

—— Justices—Contagious diseases (Animals)
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—— Justices—Summons—Service - 604
See Service of Summons.

JUSTICES—Allowance of Surveyor's accounts 86
See Surveyor's Accounts.

—— Case stated—Certiorari - - 587
See Certiorari.

—— Certificate—Stopping up highway - 46
See Stopping up Highway.

—— Jurisdiction—Claim of right - - 582
See Justices' Jurisdiction. 1.

—— Jurisdiction—Contagious diseases (Animals)
See Justices' Jurisdiction. 2. [544

—— Service of summons - - - 604
See Service of Summons.

JUSTICES' JURISDICTION—*Bonâ fide Claim of Right—Fishing in navigable River—24 & 25 Vict. c. 96, s. 24.*] A river was made navigable by a company and the public allowed to navigate it on payment of tolls, under certain Acts of Parliament; but the soil and rights of the owners on each side of the river remained untouched. The public had fished for many years in the river without interruption by the owner of the soil; but he caused a notice to be set up forbidding all fishing. The appellant afterwards fished in the river, and an information was taken out against him under 24 & 25 Vict. c. 96, s. 24. At the hearing the appellant set up the right in the public, and contended that the jurisdiction of the justices was ousted by this bonâ fide claim of right:—*Held*, that the right set up could not exist in law, and therefore title could not come in

JUSTICES' JURISDICTION—*continued.*
question, and the jurisdiction of the justices was not ousted. *Hudson* v. *Macrae* (4 B. & S. 585; 33 L. J. (M.C.) 65) followed. Hargreaves *v.* Diddams - - - - - - 582

2. —— *Contagious Diseases (Animals) Act* (32 & 33 *Vict. c.* 70) *ss.* 64, 109—*Place where the Offence was committed—Place where the Person happens to be.*] By 32 & 33 Vict. c. 70, s. 64, a railway company is to provide food and water for cattle carried by them on the request, in writing, of the consignor or any person in charge thereof, and "if in the case of any animal such request is not made, so that the animal remains without a supply of water for thirty consecutive hours, . . . the consignor and the person in charge of the animal shall each be deemed guilty of an offence against this Act. . . ." By s. 103 a penalty is imposed on any person guilty of an offence, but it is not said how the penalty is to be recovered. By s. 109, for the purposes of proceedings under this Act . . . every cause of complaint . . . shall be deemed to have arisen either in the place in which the same was actually committed or arose, or in any place in which the person charged or complained against happens to be. The appellant was the consignor of cattle from K. to C. to be carried over a railway upon a journey which lasted more than thirty hours. He did not make any request that the cattle should be supplied with water. The justices of C. issued a summons against the appellant, then being in W., and, on his appearing to the summons, convicted him of an offence against s. 64:—*Held*, first, on the authority of *Cullen* v. *Trimble* (Law Rep. 7 Q. B. 314), that the offence was within the summary jurisdiction of justices; secondly, that the conviction could not be sustained: for that the offence was completed before the cattle reached C., the thirty hours having then expired; and the appellant, by appearing before the justices in obedience to their summons, did not "happen to be" at C. and within their jurisdiction. Johnson *v.* Colam - - - - - - 544

LANDLORD AND TENANT—Proviso for re-entry
See Proviso for Re-entry. [302

LAY DAYS—*Ship and Shipping—Construction of Charterparty—Lay Days; running or working Days—Demurrage—Fraction of a Day.*] Under a charterparty from Riga to London the charterers were to "load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said lying days at 25*l.* per day":—*Held*, that the lying days from the context meant "working" and not "running" days, and consequently that Sunday was not to be counted.—The ship got into dock in London on a Tuesday evening at 5 p.m. She could not get to her berth till 8 a.m. on the Wednesday, when she began unloading, and continued till 8 p.m. She began again at 4 a.m. on Thursday, and finished at 8 a.m. All the lay days had been consumed at the port of loading:—*Held*, that in the case of demurrage a fraction of a day counted as a day, and consequently that the charterers were liable for two days demurrage. Commercial Steamship Company *v.* Boulton - - 346

LEX FORI—Foreign crew - - - 276
See Lex loci contractus.

LEX LOCI—Bill of exchange—Indorsement 525
See Indorsement of Bill of Exchange.

LEX LOCI CONTRACTUS—*Action against one of several Joint Contractors—Foreign Law—Lex loci fori—Procedure.*] To an action against a single defendant, for a breach of an agreement to build a vessel entered into between the plaintiffs and C. & Co., the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of C. & Co., and that the agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English Courts and within the jurisdiction of the Scotch Courts; and by the law of Scotland the firm was and is a distinct person from any or the whole of the individual members of whom it consists and of whom the defendant is one; and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by the name of C. & Co.; that the agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreement the firm consisted of certain individual members, who are all domiciled in Scotland; and that by the law of Scotland the defendant was, as a partner in C. & Co. in the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners jointly for any breaches of the agreement, and it is a condition precedent to any individual liability attaching to the defendant as an individual member of the firm in respect of the agreement that the firm, as such person, or the whole individual partners jointly, should first have been sued and that judgment should have been recovered against the firm or the whole of the partners jointly, and that the plaintiffs have not sued the firm of C. & Co. nor the whole of the partners jointly, nor recovered judgment against it or them:—*Held*, on demurrer, that the matters stated in the plea were matters of procedure, and that the plea was therefore bad. Bullock *v.* Caird - - 276

LIBEL—*Nonsuit on Ground of Words not capable of a defamatory Sense.*] Declaration for a libel published in a Walsall newspaper; "Walsall Science and Art Institute. The public are informed that Mr. M.'s" (the plaintiff's) "connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." Signed by the defendants as officers of the institute. Innuendo, that the plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the institute.—At the trial it appeared that the plaintiff was a certificated art master, and had been master at the institute. His engagement with the defendants ceased in June, 1874, and he got up and became master of another school, which was called "The Walsall Government School of Art," and was opened in

LIBEL—*continued.*
August; in September the advertisement complained of appeared.—The learned judge directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo:—*Held*, that the nonsuit was right: for that the advertisement was not capable of a defamatory meaning. Mulligan *v.* Cole - - - - - - 549

—— Interrogatories - - - - 217
See Interrogatories — Common Law Courts.

LICENCE—Pedlar - - - - 598
See Pedlar.

—— Refreshment house - - - 594
See Refreshment House.

—— Spirits—Conviction of felony - - 195
See Public-house.

LIEN FOR DEMURRAGE—Charterparty - 553
See Cesser of Charterer's Liability.

LIEN OF INNKEEPER—*Piano.*] A. went to the defendant's inn and stayed there with his family for some time; he took with him to the inn a piano as his own which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as innkeeper:—*Held*, affirming the decision of the Court of Queen's Bench, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so, he had a lien upon it. Threfall *v.* Borwick - - Ex. Ch. 210

LIFE ESTATE—Assent of executor - 81
See Assent of Executor.

LIGHTING RATE—Railway - - 389
See Assessment to Lighting Rate.

LIMITATIONS, STATUTE OF—*Unconditional Promise to pay—"As soon as we can get our Affairs arranged we will see you paid."*] In an action by the payees, commenced in 1873 against one of the makers of a joint promissory note, dated the 1st of October, 1858, defendant pleaded the Statute of Limitations. At the trial the following letter from defendant to plaintiffs, dated the 29th of May, 1867 (at which time the statute had run), was put in: "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands":—*Held*, by Blackburn and Archibald, JJ. (Mellor, J., dissenting), that the promise in the letter might be only conditional, and was not sufficient (without evidence to explain it) to take the case out of the statute:—*Held*, on appeal, reversing the judgment of the Queen's Bench, by Cleasby, Pollock, and Amphlett, BB., and Grove and Denman, JJ., that the promise in the letter was sufficient; Lord Coleridge, C.J., being of the contrary opinion. Chasemore *v.* Turner - - - - Ex. Ch. 500

LIST OF SHAREHOLDERS—*Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *ss.* 26, 27, *and* 49—*List of Members to be sent to Registrar—Manager de facto when liable to Penalty under s.* 27—"*Year*" *in s.* 49 *Calendar Year.*] By s. 49 of the Companies Act, 1862 (25 & 26 Vict. c. 89), a general meeting

LIST OF SHAREHOLDERS—*continued.*
of every company under this Act shall be held once at least in every year:—*Held*, that the word "year" means the period of time commencing on the 1st of January and ending on the 31st of December, and not the period of twelve months commencing from the day of registration of a company. —By s. 26: "Every company . . . shall make once at least in every year a list of all persons who on the fourteenth day succeeding the day on which the ordinary general meeting . . . is held are members of the company . . . and a copy shall forthwith be forwarded to the registrar of joint stock companies." By s. 27: "If any company . . . makes default in complying with the provisions of the Act with respect to forwarding such list such company shall incur a penalty . . . and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur a like penalty."—The appellant was the secretary of a company registered under the Companies Act, 1862. The articles of association did not provide for the appointment of a manager, and none had been appointed. At a meeting of directors in 1872, the appellant reported that he had called a general meeting of the shareholders; and in 1874 he had, in a letter to the directors, stated that unless certain contracts were carried out he should feel it his duty to summon a general meeting of shareholders. No ordinary general meeting of shareholders had been held in the year 1873, and no list of shareholders had been forwarded to the registrar in compliance with s. 26, and the appellant had not taken any steps to cause a meeting to be held in 1873. He was convicted on an information charging him, as manager, with authorizing a default in forwarding a copy of the list of shareholders to the registrar in 1873:—*Held*, by Blackburn and Lush, JJ. (Quain, J., dissenting), that the conviction ought to be affirmed; for that there was evidence that the appellant was manager de facto, and therefore a manager within s. 26; and as he took no steps in 1873 to call a meeting, and thereby made it impossible for him to forward to the registrar a list of the members, there was evidence that he had knowingly and wilfully authorized a default within s. 27. Gibson *v.* Barton - - - - - - 329

LOAN FOR SIX OR NINE MONTHS—*Option in Borrower.*] Plaintiff lent defendants 50*l.* under an agreement:—"Defendants agree to borrow from plaintiff the sum of 50*l.* at the rate of 6*l.* per annum, and plaintiff agrees to lend defendants the above sum for the term of nine or six months":—*Held*, that the option of making it a loan for six or nine months was in the defendants, the borrowers. Reed *v.* The Kilburn Co-operative Society - - - - - - 264

LOCAL BOARD—Nuisance in highway - 219
See Nuisance in Highway.

LOCAL BOARD OF HEALTH—Bye-law - 152
See Bye-law.

LORD'S-DAY—*Profanation of the Lord's-day or Sunday*—21 *Geo.* 3, *c.* 49, *s.* 1—"*Place of Entertainment or Amusement.*] The defendants, a company incorporated by an Act of Parliament, are the owners of the Brighton Aquarium, a building

LORD'S-DAY—*continued.*
which consists of chambers below the level of the ground, and a terrace above. The chief part is used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. There is also a reading-room, with newspapers, and a restaurant and dining-hall, and conservatories. The whole is open to the public on Sunday on the payment of 6*d.* each person. A band plays sacred music on the evenings of Sunday, and programmes are issued, stating what music the band will play, and at what time the fish will be fed. An action having been brought against the defendants to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment and amusement on the Lord's-day or Sunday:—*Held*, that the aquarium, under the above circumstances, was a place of entertainment and amusement within the statute. Terry *v.* The Brighton Aquarium Company - - - - - 306

LUNATIC—Criminal—Settlement 166, Ex. Ch.
See Criminal Lunatic. [519

MANAGER OF COAL MINE—Fellow-servant 62
See Negligence of Servant.

MANOR—Custom—Grant in reversion. - 310
See Custom of Manor.

MARINE INSURANCE—Assignment of policy
See Assignment of Policy. [249

MARKET—Infringement—Pedlar - - 593
See Pedlar.

MARKETS AND FAIRS CLAUSES ACT, s. 13 593
See Pedlar.

MARRIED WOMAN—Protection order - 147
See Protection Order.

MASTER AND SERVANT—Apprentice - 224
See Apprentice.

—— Carrier - - - - - - 569
See Carriers Act.

—— Hosiery manufacture - - - 383
See Deduction from Wages.

—— Negligence - - - - - 125
See Compulsory Pilotage. 1.

—— Negligence of fellow-servant - - 62
See Negligence of Servant.

—— Parol contract—Proceedings under 30 & 31 Vict. c. 141 - - - - - 97
See Master and Servant Act, 1867.

MASTER AND SERVANT ACT, 1867—30 *&* 31 *Vict. c.* 141, *s.* 3, *sch.* 1—4 *Geo.* 4, *c.* 34, *s.* 3—*Proceedings against Servant who has not entered into Service—Parol Contract not enforceable—Statute of Frauds, s.* 4.] By a parol hiring on the 11th of November, respondent agreed to serve appellant as a servant in husbandry, for one year, to commence on the 23rd of November. Respondent did not enter into his service, and an information was taken out against him under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), by s. 3 of which nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments in the first schedule to this Act, or some or one of them. By s. 3 of 4 Geo. 4, c. 34 (which is in the schedule), proceedings can be taken against a servant in husbandry who has not entered into his service only if the

MASTER AND SERVANT ACT, 1867—*continued.*
contract be in writing signed by the parties to it:—*Held*, that no proceedings could be taken against the respondent under the Act of 1867.—*Held*, also, that, as the contract was not to be performed within a year, and was not in writing, s. 4 of the Statute of Frauds would have prevented the enforcing of the contract. Banks *v.* Crossland - - - - - - - 97

MEASURE OF DAMAGES—Passenger - 111
See Damages against Carrier of Passengers.

—— Sale of goods - - - 265, 319
See Damages on Contract of Sale. 1, 2.

MEDICAL ACT, 1858, ss. 31, 32 - - 66
See Apothecary.

MEDICAL REGISTER—Apothecary - 66
See Apothecary.

MEMORANDUM IN WRITING—Sale of goods
See Frauds, Statute of. 1. [140

MENS REA—Fabrication of voting paper 162
See Fabrication of Voting Paper.

MERCHANT SHIPPING ACT, 1854 - 350
See Compulsory Pilotage. 2.

MINES—Lands connected—Poor-rate - 7
See Assessment to Poor-rate. 2.

MISDEMEANOR — *Disobedience to Order of Commissioners under Statute—Form of Order—Epping Forest Act*, 1872 (35 & 36 *Vict. c.* 95), *s.* 5.] By the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95), s. 5, the commissioners were authorized to make orders prohibiting, until the expiration of the session of Parliament next after their final report, any inclosures of land made before the Act of 1871, and for the prevention of any waste, injury, or destruction of vert, herbage, trees, &c., in or upon any land within the forest subject in their judgment to any forestal or common rights. The commissioners made an order, that until the expiration of the session of Parliament next after their final report, "all persons be and are hereby prohibited from committing any waste, &c., in or upon the waste lands in the forest within the manor of Theydon Bois (including inclosures of waste lands made within twenty years next preceding the said 21st of August, 1871), all which lands are distinguished, on a plan annexed, by the colour green."—The defendant was the occupier, as tenant, of a piece of land, part of the above waste lands, which was inclosed some time since 1851, and is part of the land coloured green on the plan, and persons claimed right of pasturage over all the waste lands. The order was served upon the defendant, and he afterwards committed waste by digging marl and clay, &c.; upon which an indictment was preferred against him for disobeying the order. A verdict of guilty having been entered:—*Held*, that the order was good; and that disobedience to it was a misdemeanor. The Queen *v.* Walker - - - - 355

MONEY HAD AND RECEIVED—Fraud - 491
See Fraud.

MUNICIPAL CORPORATION—Watch-house 279
See Watch-house.

NAVIGABLE RIVER—Claim to fish - 582
See Justices' Jurisdiction.

NEGLIGENCE—Fellow-servant - - 62
See Negligence of Servant.

—— Injury to land—Damage to contractor 453
See Remoteness of Damage.

—— Local Board—Defective grating - 219
See Nuisance in Highway.

—— Master and servant - - - 125
See Compulsory Pilotage. 1.

—— Previous conviction - - - 378
See Previous Conviction.

—— Railway company - 212, 271, 298, 437
See Evidence of Negligence. 1, 2, 3, 4.

NEGLIGENCE OF SERVANT—*Master and Servant—Liability of Master for Injury caused by Fellow-servant—Manager appointed under Coal Mines Regulations Act*, 1872 (35 & 36 *Vict. c.* 76).] The defendants were the owners of a colliery within the Coal Mines Regulations Act, 1872 (35 & 36 Vict. c. 76), and they had and appointed a certificated manager as required by s. 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager:—*Held*, that the fact that the manager was appointed pursuant to the Act did not put him in any different position from that he would have held had he been simply appointed manager; and that he was a fellow-servant with the deceased; and the defendants were, therefore, not liable to the representatives of the deceased for his death. Howells *v.* Landore Siemens Steel Company - - - 62

—— Pilot - - - - - - 125
See Compulsory Pilotage. 1.

NEW TRIAL—Inadequacy of damages - 54
See Inadequacy of Damages.

NONSUIT—Libel - - - - - 549
See Libel.

NUISANCE—Highway—Defective grating 219
See Nuisance in Highway.

NUISANCE IN HIGHWAY — *Local Board of Health, Liability of, for Defect in Grating over a Sewer*—11 & 12 *Vict. c.* 63, *ss.* 43, 45.] As the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. Plaintiff brought an action against the local board of health of the district, who are the surveyors of the highway, by ss. 68, 117, of 11 & 12 Vict. c. 63, and in whom also the sewers are vested under ss. 43, 45:—*Held*, that, though the defendants might not be liable as surveyors of the highway, they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state. White *v.* Hindley Local Board of Health - 219

OCCUPATION FOR POOR-RATE 70, 230, 422, [444
See Assessment to Poor-rate. 3, 4, 5, 6.

OPTION AS TO TIME — Loan for six or nine months - - - - - 264
See Loan for six or nine Months.

ORDER OF COMMISSIONERS—Epping Forest
See Misdemeanor. [355

"OWNER" - - - **16, Ex. Ch. 203**
See Repair of Road. 1.

PART PERFORMANCE—Contract—Condition
See Condition Precedent. [564

PASSENGER—Carriage—Damages - **111**
See Damages against Carrier of Passengers.

—— Railway company—Negligence **212, 271,** [**298, 437**
See Evidence of Negligence. 1, 2, 3, 4.

PASSENGER TRAVELLING AT HIS OWN RISK—Railway - - - - **212, 437**
See Evidence of Negligence. 3, 4.

PASSENGERS' LUGGAGE—*Railway Company—Liability for Loss of Luggage "arising off their Lines"—Construction of Condition—Evidence.*] Plaintiff took a ticket of the M. Ry. Co. from A. to C. On the ticket was stated that it was issued subject to the conditions in the company's time-tables, one of those conditions being: "The company does not hold itself responsible for any delay, detention, or other loss or injury arising off its lines."—The journey from A. to C. is on the M. line to B., and thence by the L. & N. W. line. At B. the station belongs to the L. & N. W. Co., and all the clerks and porters are hired and paid by that company; but by agreement, sanctioned by Act of Parliament, the M. company have the use of the station and the services of the clerks and porters on payment of an annual sum.—Plaintiff delivered his luggage to the M. Co. at A.; and when the train by which he travelled arrived at B., a porter took plaintiff's luggage from the train and put it on a truck and, after about twenty minutes, wheeled the truck across to the platform from which the L. & N. W. train was about to start for C. The plaintiff saw the luggage on the platform, and this was the last that was seen of it. On the above facts, the Court having power to draw inferences of fact:—*Held*, that, assuming the plaintiff to be bound by the condition, the meaning of "off the company's lines," when applied to luggage, must be taken to be, not "off the lines of railway" merely, but "out of the custody of the company." The plaintiff's luggage was shewn to have been delivered to the defendants, and it lay on them to shew that they had delivered it to the L. & N. W. Co., which they had not shewn; and the plaintiff was therefore entitled to recover against the defendants for the loss. Kent *v.* Midland Railway Company - - - - - - **1**

PATENT—Infringement—Right of the Crown
See Infringement of Patent. [130

PAVING EXPENSES—Apportionment - **465**
See Repair of Road. 2.

PEDLAR — *Certificate — Market — Pedlar using Horse—Hawker—Markets and Fairs Clauses Act* (10 & 11 *Vict. c.* 14), *s.* 13—*Pedlars Act*, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 6.] By the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), s. 13, "Every person other than a licensed hawker" selling tollable articles within the limits prescribed by the special Act authorizing a market is liable to a penalty.—By the Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3, a pedlar is defined as a "hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot." By s. 6 a pedlar's certificate is operative within the police district in which it is taken out. And "for the purpose of the Markets and Fairs Clauses Act, 1847, and any Act incorporating the same, a certificate under this Act shall have the same effect within the district for which it is granted as a hawker's licence, and the term 'licensed hawker' in the first-mentioned Act shall be construed to include a pedlar holding such a certificate":—*Held*, by Blackburn and Mellor, JJ. (Lush, J., dissenting), that a pedlar holding a pedlar's certificate and trading within the district for which it was granted, but using a horse and cart and therefore not acting as a pedlar within the definition in s. 3 of the Pedlars' Act, was yet within the exemption of s. 13 of the Markets and Fairs Clauses Act as extended by s. 6 of the Pedlars Act, and was not liable to a penalty for selling tollable articles within the limits prescribed by the special Act constituting a market. Howard *v.* Lupton - - - - - **598**

PEDLARS ACT, 1871, ss. 3, 6 - - **598**
See Pedlar.

PETITION OF RIGHT—*When it will lie—Unliquidated Damages for Breach of Contract*—23 & 24 *Vict. c.* 34.] A petition of right will lie for a breach of contract resulting in unliquidated damages.—So held on the authority of the *Banker's Case* (14 How. St. Tr. 1). Thomas *v.* The Queen [31

2. —— *Discovery of Documents*—23 & 24 *Vict. c.* 34, *s.* 7—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 50.] In a petition of right there is no power to the suppliant to obtain a discovery of documents under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 50. Thomas *v.* The Queen - **44**

PIANO—Innkeeper's lien - - - **210**
See Lien of Innkeeper.

PILOT—Injury by negligence - - **125**
See Compulsory Pilotage. 1.

PLACE WHERE OFFENCE COMMITTED—Jurisdiction - - - - **544**
See Justices' Jurisdiction. 2.

POOR LAW—Criminal lunatic **166, Ex. Ch. 579**
See Criminal Lunatic.

POOR-RATE—Assessment—Certified school **283**
See Assessment to Poor-rate. 1.

—— Assessment—Land connected with mines **7**
See Assessment to Poor-rate. 2.

—— Assessment—Occupation **73, 230, 422, 444**
See Assessment to Poor-rate. 3, 4, 5, 6.

PRACTICE—Inadequacy of damages - **54**
See Inadequacy of Damages.

—— Libel—Nonsuit - - - - **549**
See Libel.

—— New trial - - - - **54**
See Inadequacy of Damages.

PREVIOUS CONVICTION—*First Bar to Second Conviction—5 & 6 Wm. 4, c. 50, s. 78; 24 & 25 Vict. c. 100, s. 42.*] The appellant was summarily convicted under s. 78 of 5 & 6 Wm. 4, c. 50, for that he, being driver of a carriage on a highway, by negligence and wilful misconduct, to wit, by striking a horse ridden by the respondent, caused hurt and damage to the respondent; he was afterwards convicted, on the same facts, under s. 42 of 24 & 25 Vict. c. 100, for unlawfully assaulting the respondent:—*Held*, that the first conviction was a bar to the second. Wemyss *v.* Hopkins [378

PRINCIPAL AND AGENT—Contract - 57
See Contract by Agent.

PRISON ACT, 1865, s. 66 - 166, Ex. Ch. 579
See Criminal Lunatic.

PRODUCTION OF DOCUMENTS — Petition of right - - - - - 44
See Petition of Right. 2.

PROMISE TO PAY—Statute of Limitations [Ex. Ch. 500
See Limitations, Statute of.

PROTECTION ORDER—*Husband and Wife—Married Woman deserted by Husband having obtained "Order of Protection" entitled to sue in tort—20 & 21 Vict. c. 85, s. 21.*] A wife who has been deserted by her husband and has obtained an order of protection under 20 & 21 Vict. c. 85, s. 21, can bring an action in her own name for libel. Ramsden *v.* Brearley - - 147

PROVISO FOR RE-ENTRY—*Ejectment—Landlord and Tenant—Agreement for Lease—Construction.*] By an agreement in writing, but not under seal, plaintiff agreed to let and defendant to hire on lease for twenty-one years a house, &c., on the following terms: The rent to be 55*l.* per annum; the lease to commence from the 25th of March next, and to contain an extract of the covenants in the original lease which the plaintiff is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of the plaintiff. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. Defendant entered and paid rent, and underlet the premises without the consent of plaintiff, who thereupon brought ejectment, and was nonsuited:—*Held*, that the nonsuit was right. Defendant held as tenant from year to year, on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, and the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting; and, on the authority of *Shaw* v. *Coffin* (14 C. B. (N.S.) 372), on mere words of agreement a condition could not be created. Crawley *v.* Price - - 302

PUBLIC HEALTH ACT, 1872, s. 43 - - 180
See Assessments to Sanitary Rate.

PUBLIC-HOUSE—*Wine and Beer Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 14—Licence to sell Spirits by retail—"Any person convicted of felony"—Retrospective Operation of Statute.*] By 33 & 34 Vict. c. 29, s. 14, "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence shall be granted to any person who shall have been so convicted; and if any person after having been so convicted shall take out or have a licence, the same shall be void to all intents and purposes; and every person who, after having been so convicted, shall sell spirits by retail, shall incur the penalty for doing so without a licence:"—*Held* (by Cockburn, C.J., and Mellor and Archibald, JJ.; Lush, J., dissenting), that the section applied to a person convicted of felony either before or after the Act passed; and that licences held by a person convicted before the Act became void on the passing of the Act. The Queen *v.* Vine - 195

RAILWAY—Lighting rate - - - 389
See Assessment to Lighting Rate.

RAILWAY COMPANY—Advice note—Liability [256
See Advice Note of Goods.

—— Negligence - - 212, 271, 298, 437
See Evidence of Negligence. 1, 2, 3, 4.

—— Passenger—Damages - - - 111
See Damages against Carrier of Passengers.

—— Passengers' luggage - - - 1
See Passengers' Luggage.

—— Warehousemen—Liability - - 256
See Advice Note of Goods.

RATES—Lighting rate—Railway - - 389
See Assessments to Lighting Rate.

—— Poor-rate—Assessment 7, 70, 230, 283, [422, 444
See Assessment to Poor-rate. 1, 2, 3, 4, 5, 6.

RATIFICATION—Sale of goods - - 140
See Frauds, Statute of. 1.

REASONABLE TIME BEFORE APPEARANCE—Service of summons - - 604
See Service of Summons.

RE-ENTRY—Proviso for - - - 302
See Proviso for Re-entry.

REFRESHMENT HOUSE—*Licence—23 & 24 Vict. c. 27 s. 6—Entertainment.*] By s. 6 of 23 & 24 Vict. c. 27, "all houses, rooms, shops, or buildings, kept open for public refreshment, resort, and entertainment," during certain hours of the night, are to be deemed refreshment houses and require a licence. The defendant's house was called The Café; it was found open during the night, and seventeen females and twenty gentlemen were there, and were supplied with cigars, coffee, and ginger beer, which they consumed. Upon these facts justices convicted the defendant upon a charge of keeping a refreshment house without a licence:—*Held*, that the house was kept open for public refreshment, resort, and entertainment, and that the conviction was right. Muir *v.* Keay [594

REGISTRATION—Medical practitioner - 66
See Apothecary.

REGULÆ GENERALES (ATTORNEYS) H. T. 1853, r. 5 - - - - - 138
See Articled Clerk. 1.

REMOTENESS OF DAMAGE—*Negligence—Injury to Real Property—Consequential Damages to Third Person having a Contract for Work on the Property—Illegality—Rights of Wrong-doer.*] Defendants, a waterworks company, under their Act laid down one of their mains along and under a turnpike-road, made under an Act which declared the soil to be in the owners of the adjoining land, subject only to the right to use and maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, and wanting to connect his land on either side, K. employed plaintiff, at an agreed sum, to make a tunnel under the road. In doing the work, it was discovered that there was a leak in the defendants' main higher up the road, and on the plaintiff digging out the earth, the water from the leak flowed down upon the work and delayed it, so as to cause pecuniary damage to the plaintiff, for which he brought an action against defendants:—*Held*, that, assuming K. could have maintained an action against defendants for injury to his property (as to which the Court gave no opinion), the damage sustained by plaintiff by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave plaintiff no right of action against defendants.—The tunnel was formed by digging through half the width of the road, forming the tunnel, and then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor and the trustees:—*Held*, assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent plaintiff who was engaged in it from recovering damages for a wrong. Cattle *v.* The Stockton Waterworks Company - - 453

REPAIR OF ROADS—*Metropolis Management Acts*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250; *and* 1862 (25 & 26 *Vict. c.* 102), *s.* 77—"*Owners of Land*"—*Public Roads not Land bounding or abutting on Streets.*] The defendants, a land company, being owners of certain lands, in 1863 laid them out for building purposes, and made roads and ways across them; and nearly the whole of the estate was sold in lots to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on coloured plans attached to the conveyance. Each lot had a frontage upon one of the roads. The roads had been dedicated to the public, as far as any act of the defendants could do so, but no proceedings were taken to make them repairable by the parish. The plaintiffs, the board of works of the district, from time to time paved the new streets formed by the houses on the estate, and apportioned the costs among the owners of houses forming the streets and the owners of land bounding and abutting on the street; and in so doing they assessed the defendants in respect of the new streets and roads where bounding or abutting on the sides or ends of the streets paved, as "lands abutting" on those streets, under s. 77 of 25 & 26 Vict. c. 102:—*Held*, in the Exchequer Chamber, reversing the judgment of the Queen's Bench, that, assuming the soil of the roads to be in the

REPAIR OF ROADS—*continued.*
defendants, they were improperly charged under 25 & 26 Vict. c. 102, s. 77, for that they were not, in respect of the roads which had been irrevocably dedicated to the public, "owners of land within" the meaning of that section and s. 250 of 18 & 19 Vict. c. 120. Plumstead Board of Works *v.* British Land Company - 16, Ex. Ch. 203

2. —— *Metropolitan Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Enforcing Payment of Expenses of paving—Apportionment of Expenses conclusive.*] The principle on which the expenses of paving a new street have been apportioned amongst the adjoining owners by a district board, pursuant to 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, cannot be questioned before any tribunal. Nesbitt *v.* Greenwich Board of Works - 465

3. —— *Highway—Exemption from Liability to repair Highway—Evidence of Custom to exempt—Proof of Consideration.*] The parish of C. contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners and occupiers in which had never in the memory of man paid highway rates, nor done team work, nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it:—*Held*, by Cockburn, C.J., Quain and Field, JJ. (Lush, J., dissenting), that the above circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits. The Queen *v.* Rollett - - - - 469

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SERVICE OF SUMMONS—*Justices of the Peace—Service of Summons "at last or most usual Place of Abode"—Proof that Summons was duly served upon such Party a reasonable Time before the Time appointed for Appearance"*—11 & 12 *Vict. c.* 43, *ss.* 1 *and* 2.] By s. 1 of 11 & 12 Vict. c. 43 . . . every summons shall be served . . . upon the person to whom it is directed by delivering it to him personally, or by leaving it with some per-

SERVICE OF SUMMONS—*continued.*
son for him at his last or most usual place of abode: and the person who shall serve the same shall attend at the time and place, and before the justices in the summons mentioned, to depose, if necessary, to the service of the summons. . . . By s. 2 . . . if upon the day and at the place appointed for the appearance of the party so summoned he shall fail to appear in obedience to such summons, then, if it be proved upon oath or affirmation to the justices then present that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance, it shall be lawful for such justices to proceed ex parte to the hearing of such information, and to adjudicate thereon as fully and effectually as if such party had personally appeared in obedience to the summons.—The defendant was a fisherman, and went to sea in pursuit of his calling on the 9th of March. On the same day a summons for an assault was taken out against him, requiring him to appear to answer the charge upon the 12th. On that day, it having been proved that a summons was served on the defendant on the 10th, by leaving it with his mother at his usual place of abode, the justices convicted him in his absence. Upon the 9th of April, he returned from sea, and was arrested under the conviction:—*Held*, that there was no evidence before the justices that a reasonable time had elapsed between the time of the service of the summons and the day for hearing the summons, and the justices had therefore no jurisdiction to convict. THE QUEEN *v.* SMITH - - 604

SETTLEMENT OF POOR—Criminal lunatic [166, Ex. Ch. 579
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SEWER—*Trespass—Grant of Drain—Power of Grantee to deepen—Easement.*] By indenture, executed by both parties, defendant conveyed to plaintiff in fee certain land, "subject, nevertheless, to the joint-ownership and right to the use by the defendant and the owners and occupiers for the time being, of certain adjoining land, as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed, and the course and direction of which was delineated on a plan in the margin of the deed, and subject to the right of the defendant and the occupiers, &c., at all reasonable times to enter upon the land thereby conveyed for the purpose of repairing the drain and laying or replacing pipes therein."—The Local Board of Health, under s. 49 of 11 & 12 Vict. c. 63, after the above conveyance, constructed a new sewer (in lieu of the old one, into which the drain discharged the sewerage from the plaintiff's and defendant's premises), at a lower depth; and the defendant thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. Plaintiff having brought an action of trespass:—*Held*, that the effect of the deed, executed by both parties, was either to create a tenancy in common in the drain between the plaintiff and defendant, or only an easement in the defendant, but that, in either view, the defendant had done no more than he had the right to do. FINLINSON *v.* PORTER 188

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STOPPING UP HIGHWAY—*5 & 6 Wm. 4, c. 50, ss. 84, 85—Certificate, Requisites of.*] A certificate given under the hands of two justices pursuant to 5 & 6 Wm. 4, c. 50, s. 85, is sufficient if it states the existence of the circumstances required by that section. It is unnecessary to state that the preliminaries enacted by s. 84 have been complied with. The Queen *v.* Harvey - 46

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SURVEYOR'S ACCOUNTS—*Highway—Team Work done by Surveyor—Allowance of illegal Charges by Justices—5 & 6 Wm. 4, c. 50, ss. 44 & 46.*] By s. 46 of 5 & 6 Wm. 4, c. 50, a penalty is imposed on any surveyor of highways who shall have any interest, directly or indirectly, in any contract for work or materials to be done or provided for any of the highways under his care or management, or shall let to hire any team to be used in making or repairing such highway, unless a licence in writing be first obtained from two justices in special sessions assembled. By s. 44 the accounts of the surveyor are to be laid before the justices at special sessions, and if any complaint be made against the accounts, the justices, if they shall think fit, are to examine the surveyor on oath, and to make such order thereon as to them shall seem meet.—A surveyor of highways having charged in his accounts certain items for work and materials and team hire, which were illegal under s. 46, the justices in special sessions, on complaint made to them, after examining the surveyor on oath, made an order, under s. 44, allowing the accounts:—*Held*, that the charges were made illegal by s. 46; and the justices had therefore no discretion under s. 44, and the order allowing the accounts was bad. Barton *v.* Piggott and Eskrett - - - 86

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"WAYS NOW OCCUPIED OR ENJOYED"—*Easement—Right of Way—Grant of new Way by general Words, "All Ways and Rights of Way, occupied or enjoyed, or reputed as appurtenant."*] Defendant was owner in fee of a dwelling-house, together with a cottage and stable belonging to it, called "Roseville," and was also owner in fee of an adjoining farmstead and farm, having a private road which led from a high road to the farm buildings, and passed close to one side of the stable of Roseville. By indenture of the 1st of May, 1860, defendant demised Roseville to H. for ten years. H. entered on the premises, and built over the stable a hay loft, with two openings towards the private farm road, having first obtained permission from defendant to do so, and also permission from defendant and the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, &c., to the loft, that being the only access to the openings in the loft. H. and the sub-tenants occupying Roseville continued during the term to use the road up to May, 1870; at that time plaintiff agreed to purchase Roseville of defendant; and by deed of the 2nd of August, 1870, Roseville, &c., was conveyed by defendant to plaintiff in fee, "together with all . . . ways and rights of way, . . . easements, and appurtenances to the said dwelling-house, cottage, and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto":—*Held*, that the right to use the farm road for the aforesaid purposes passed to the plaintiff under the above words.—*Langley* v. *Hammond* (Law Rep. 3 Ex. 161), discussed. Kay v. Oxley - - 360

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LONDON PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

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